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Subjects: Mining Law, Discovery, Court Decisions
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Reference: U. S. v. Gunsight Mining Corporation, Hearing Examiner's Decision, September 5, 1969.

Data: The subject decision contains a useful summary of Supreme Court and Lower Federal Court decisions concerning what constitutes a discovery of a valuable mineral deposit. The pertinent parts are reproduced on the attachment.

Please send any additional references on this subject or other minerals subjects to DSC (D-310). If the complete article or publication is needed, DSC (D-310) will attempt to obtain a copy or a loan for you.

This decision will cover in the order stated (1) the question of what constitutes a valuable mineral deposit that must be found in order to have a valid discovery within the purview of the mining laws, (2) the question of when, from a time standpoint, the contested mining claims must be supported by a sufficient discovery in order to have a valid mining claim, (3) a brief history of the claims, (4) evidence relating to the finding of valuable mineral deposits within the Surprise, the Cashier and the Galena groups of claims, (5) evidence relating to the finding of a valuable mineral deposit within the Richlieu claim, which is in a category separate from the other contested claims, (6) the motion to dismiss filed by the contestee at the conclusion of the case presented in behalf of the Arizona Land Office Manager and (7) conclusions concerning the validity of the contested claims.

What Constitutes the Discovery of a Valuable Mineral Deposit

Since 1894 this question has generally been answered by simply referring to the so-called prudent man test set forth in the departmental decision entitled Castle v. Womble, 19 L.D. 455 (1894) and approved by the Supreme Court of the United States on a number of occasions.4/ In that case the criteria for determining whether a valuable mineral deposit has been found was stated as follows:

> ...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. (p. 457)

From the number of cases that have come before the Department of the Interior and the courts involving the question of what constitutes a discovery of a valuable mineral deposit, it would appear that the standard announced in Castle v. Womble, supra, is less than clear especially from the standpoint of (1) when a person of ordinary prudence must be justified in the further expenditure of his labor and means and (2) the type of activity that a person of ordinary prudence must be justified in pursuing with the further expenditure of labor and means.

4/ See Chrisman v. Miller, 197 U.S. 313 (1905); Cameron v. United States, 252 U.S. 450 (1919); Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963); United States v. Coleman, 390 U.S. 599 (1968).

For this reason and because of the strong positions taken by the contestee concerning the application of the prudent-man test, the interest shown by the contestee and its stockholders in the contested mining claims, and the alleged potential value of the contested claims, the question of what constitutes a discovery of a valuable mineral deposit would certainly seem to merit more consideration than simply a reiteration of the language of Castle v. Womble, supra. Accordingly, the question will be given fairly detailed treatment by considering first and in chronological order the decisions of the Supreme Court of the United States and then the recent decisions of lower federal courts in an effort to answer the subsidiary questions of (1) when there must be a justification for the further expenditure of labor and means and (2) the type of activity that must be justified.5/

In United States v. Iron Silver Mining Company, 128 U.S. 673 (1888), the Supreme Court in construing the requirements of the mining laws stated:

> ...There must be a discovery of the mineral, and a sufficient exploration of the ground to show this fact beyond question... (p. 676)

In Davis v. Wiebbold, 139 U.S. 507 (1891), the Supreme Court in approving rulings of the Department of the Interior with respect to applications for mineral patents under the mining laws stated:

> .../The rulings/ are that such applications should not be granted unless the existence of mineral in such quantities as would justify expenditure in the effort to obtain it is established as a present fact. If mineral patents will not be issued unless the mineral exist in sufficient quantity to render the land more valuable for mining than for other purposes, which can only be known by development or exploration, it should follow that the land may be patented for other purposes if that fact does not appear. (p. 523)

5/ Since the contestee asserts that the decisions of the Department of the Interior have discredited and frustrated the mining laws, primary emphasis will be given to the decisions of the Supreme Court of the United States and recent decisions of lower federal courts.

In the case of Iron Silver Mining Company v. Mike & Starr Gold and Silver Mining Company, 143 U.S. 394 (1892), the court stated in part:

> Another question is, whether this was such a vein bearing gold, silver, cinnabar, lead, or other valuable deposit as that a discoverer could obtain title thereto under sections 2320 and 2325. It is undoubtedly true, that not 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. (p. 404)
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> ...It cannot be said, as a matter of law in advance, how much of gold or silver must be found in a vein before it will justify exploitation and be properly called a "known" vein. (p. 404)
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> ...So, here, the amount of the ore, the facility for reaching and working it, as well as the product per ton, are all to be considered in determining whether the vein is one which justified exploitation and working... (p. 405)

In Chrisman v. Miller, 197 U.S. 313 (1905), the Supreme Court specifically considered what was necessary to constitute a discovery of mineral sufficient to validate a mining claim. In that case some oil had been found seeping at the surface within the limits of an oil placer mining claim. The Court stated with respect to this finding of mineralization:

> It does not establish a discovery. It only suggests a possibility of mineral of sufficient amount and value to justify further exploration. (p. 320)

The Court, after recognizing that the discovery requirements of the mining laws are the same with respect to placer and lode claims, accepted the following declaration of what is necessary to constitute a discovery of a valuable mineral deposit:

> ...the mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. 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. (p. 322)

In the case of Cole v. Ralph, 252 U.S. 286 (1920), the Court quoted the above declaration from Chrisman v. Miller as "showing what constitutes an adequate discovery." (p. 299) The Court also noted:

> ...The defendent testified that no ore was ever mined upon any of the lode claims, and that "there was no mineral exposed to the best of my knowledge which would stand the cost of mining, transportation, and reduction at a commercial profit." In the circumstances this tended to discredit the asserted discoveries; and of like tendency was...his further statement referring to vein material particularly relied upon as a discovery, that he "would hate to try to mine it and ship it." (p. 299)

In the recent case of United States v. Coleman, 390 U.S. 599 (1968), the Supreme Court stated:6/

> ...The Secretary of the Interior held that to qualify as "valuable mineral deposits" under 30 U.S.C. § 22 it must be shown that the mineral can be 'extracted, removed and marketed at a profit"--the so-called "marketability test."... (p. 600)

* * *

6/ An initial footnote observation by the court is significant from the standpoint of recognizing that the "valuable mineral deposit" mentioned in the mining laws must be found. The court noted:

> The cornerstone of federal legislation dealing with mineral lands is the Act of May 10, 1872, 17 Stat. 91, 30 U.S.C. § 22, which provides in § 1 that citizens may enter and explore the public domain and, if they find "valuable mineral deposits," may obtain title to the land on which such deposits are located... (p. 600)

...the marketability test is an admirable effort to identify with greater precision and objectivity the factors relevant to a determination that a mineral deposit is "valuable." It is a logical complement to the "prudent-man test" which the Secretary has been using to interpret the mining laws since 1894... (p. 602)

* * *

...Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes. The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent-man test, and the marketability test which the Secretary has used here merely recognizes this fact. (p. 602)7/

* * *

...the prudent-man test and the marketability test are not distinct standards, but are complementary in that the later is a refinement of the former... (p. 603)8/

7/ In view of the above language of the Supreme Court concerning economics, and the emphasis placed on anticipated costs and returns in older Supreme Court decisions, it is difficult to understand the contentions advanced by the contestee that economic factors cannot properly be considered in determining the validity of a mining claim (Tr. 92-95, 251).

8/ The Court of Appeals for the Ninth Circuit in Coleman v. United States, 363 F. 2d 190 (1966), had expressed the opinion that present marketability was an additional element to the prudent-man test of discovery, and that such an additional standard was not justified under the mining laws. The lower court, in the decision that was reversed by the Supreme Court, had construed the proper test of discovery as including "a forecase of the reasonably anticipable future." (p. 202)

The recent decisions of the lower federal courts can be placed in better perspective by considering first the particular decision of the Department of the Interior that was the subject of judicial review by the court.

In United States v. Ford M. Converse, 72 I.D. 141 (1965), the contested lode mining claims allegedly contained valuable mineral deposits yielding gold, silver, lead, zinc and copper. The Hearing Examiner found that minerals had been known to be in the area of the claims for half a century. He found that mineral samples showing substantial quality had been found within the claims, but that the problem was to determine whether there was a sufficient concentration of minerals to justify the cost of development, and that there was no evidence at the hearing that this determination had been made. The Hearing Examiner concluded that there had not been a discovery of a valuable mineral deposit as required by the mining laws, and expressed the thought that the most favorable finding that could be made for the mining claimant was that there was sufficient evidence of mineralization to induce a prudent man to retain the claims until more extensive exploration had been completed. On appeal the Department found that there was no error in the conclusions of the Hearing Examiner and noted:

> The Department, however, recognizes a distinct difference between exploration and discovery under the mining laws. Exploration work is that which is done prior to discovery in an effort to determine whether the land contains valuable minerals. Where minerals are found, it is often necessary to do further exploratory work to determine whether those minerals have value and, where the minerals are of low value, there must be more exploration work to determine whether those low-value minerals exist in such quantities that there is a reasonable prospect of success in developing a paying mine. It is only when the exploratory work shows this that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made. (p. 149)

The District Court for the District of Oregon in Converse v. Udall, 262 F. Supp. 583 (1966), and the Court of Appeals for the Ninth Circuit in Converse v. Udall, 399 F. 2d 616 (1968), affirmed the action of the Department in drawing a sharp distinction between "exploration" and "development" in determining whether a valuable mineral deposit has, in fact, been found sufficient to constitute a valid discovery under the mining laws. On this particular point the Court of Appeals stated:

> Converse attacks the Secretary for drawing a distinction between "exploration," "discovery," and "development." But the authorities we have cited show that there is a difference between "exploration" and "discovery." (p. 620)

The decision of the Court of Appeals in the Converse case is also significant from the standpoint of summarizing earlier holdings of the Supreme Court with respect to the role of marketability and economics in determining whether a valuable mineral deposit has been found. The Court stated:

> Thus it was made clear as long ago as 1888 /in the case of United States v. Iron Silver Mining Company, supra,/ that the finding of some mineral, or even of a vein or lode, is not enough to constitute discovery--their extent and value are also to be considered. (p. 619)

* * *

> We think it clear that the marketability test is applicable to all mining claims. We do not agree with Converse's argument...that marketability has no relevance in a case where the discovery is of precious metals. Such a holding would be contrary to Mr. Justice Field's rationale in United States v. Iron Silver Mining Company, supra, (128 U.S. at 683, 9 S. Ct. 195) and to the rationale of the prudent man test itself. It, too, concerns itself with whether minerals are "valuable in an economic sense." And that is the way that courts have long interpreted it. That is what Mr. Justice Field was writing about. So was Mr. Justice Brewer in Chrisman v. Miller, supra, (197 U.S. at 322-323, 25 S. Ct. 468). So was Mr. Justice Van Devanter in Cole v. Ralph, supra, (252 U.S. at 299, 40 S. Ct. 321)... (p. 621)

In United States v. Vernon O. and Ina C. White, 72 I.D. 522 (1965), the placer mining claims there involved had been located in the early 1920's for gold, platinum, and other minerals. The Department, in concluding that the claims were properly declared null and void, stated:

> ...Nor is it sufficient to constitute discovery that the mineral showings indicate only that more exploratory work is warranted. /cases cited/ Further, the mere hope or expectation,

based upon a general belief that values will increase at depth, is not sufficient to validate a claim. (p. 526)

* * *

...Labor costs must clearly be considered in determining whether a mining operation has a reasonable prospect of success. (p. 526)

* * *

The incredibility of the appellants' contention that they have made a discovery is perhaps most clearly pointed out by the testimony they elicited from their own witnesses that in 1923 and 1924 there existed on the claims mineral deposits that could have been developed by a prudent person with a reasonable prospect of success. If this were so, it passes belief that in the 38-39 years elapsing until the hearing appellants mined only 6 ounces of gold. How long were they going to wait before commencing a mining operation, and, more importantly, why were they waiting? The answer seems plain--that they have not yet found any values sufficient to warrant development. (p. 526)

The District Court for the District of Idaho (in an unpublished decision) and the Court of Appeals for the Ninth Circuit in White v. Udall, 404 F. 2d 334 (1968), affirmed the action of the Department. The Court of Appeals stated:

> The latest Coleman opinion controls the issues of the instant case in that the Supreme Court approved the standards used here by the Secretary. The proper standards were applied, there is substantial evidence to support the Secretary's decision that there was no valid discovery, and therefore his decision is binding on this court. (p. 334)

In United States v. C. F. Snyder et al., 72 I.D. 223 (1965), the contested lode claims were located in 1941 based upon an alleged discovery of uranium and vanadium. The lands were withdrawn from location under the mining laws as of March 30, 1948. Prior to the withdrawal some mineralization had been found outcropping at the surface. In 1958 a substantial ore body was found

at depth and the property subsequently produced some 2500 tons of uranium ore. In concluding that the claims were not supported by a discovery of a valuable mineral deposit as of the date of the withdrawal in 1948 the Department commented:

> Particularly applicable to this case is the long-established rule of the Department, stated in the case of Rough Rider and Other Lode Claims, 41 L.D. 242 (1911), as follows (syllabus):
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> > The exposure of substantially valueless deposits on the surface of a lode mining claim, in themselves insusceptible of practical development, but which taken in connection with other established geological and mineralogical conditions in the district lead to the hope or belief that a valuable mineral deposit exists within the claim, does not constitute the discovery of a vein or lode within the meaning of the law nor afford a valid basis for a lode location. (p. 227)
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> ...The fact that experience in the area might have indicated that ore bodies at depth might be found where surface mineralization existed does not satisfy the requirement of a discovery... (p. 230)
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> In short, the great preponderance of the evidence, including that submitted by the contestees, is that the mineralization found on the surface of the claims, even as of this late date, if of such a low grade as to have no commercial value.
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> In this connection, it is to be noted that, except possibly for the affidavit of Reinhardt, no evidence has been submitted at any time as to the possible or probable size of the vein, lode, or deposit claimed to have been discovered on the surface of the claims.

> Thus, even a high-grade sample of an isolated bit of material would be meaningless in itself without a showing of the probable size of the deposit from which the sample was taken... (p. 232)
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> Thus, although the affiants expressed their opinion that a prudent man would have been justified in 1941 or 1948 in spending time and money on the claims with the reasonable expectation of developing a paying mine, not one stated his belief that the mineralization found on the surface in the Brushy Basin member constituted in itself a discovery of the valuable deposit. Rather the affiants were saying no more than that the mineralization found warranted a prudent man in proceeding further to find a valuable deposit which could reasonably be inferred to exist at depth but which had not yet been reached when the withdrawal became effective on March 30, 1948. (p. 232)

The District Court for the District of Colorado in Snyder v. Udall, 267 F. Supp. 110 (1967), set aside the decision of the Department on the grounds, among others, that the mineral examiners in arriving at their opinions of "no discovery" included an erroneous requirement, "namely, that the 'discovery' must be a discovery of minerals of sufficient commercial value to justify mining them with an expectation of profit." (p. 113) The court in concluding that an erroneous test had been applied specifically noted that one of the mineral examiners had testified that the minerals discovered prior to the withdrawal deserved "some more exploratory work, but they do not deserve the commencing of mining operations." (p. 115)

In Udall v. Snyder, 405 F. 2d 1179 (1968), the Court of Appeals Tenth Circuit reversed the District Court on the authority of the decision of the Supreme Court in the Coleman case, supra. The Court stated:

> The Supreme Court now makes it plain to us that in the case at bar the Secretary applied the approved standard in determining that for want of a valuable mineral deposit no discovery had been made by appellant at the time the land in

question was validly withdrawn. (p. 1180)9/

It seems clear from the foregoing Supreme Court cases and lower federal court cases that a valid discovery of a valuable mineral deposit does not exist unless minerals have been found and the evidence is such as to justify a person of ordinary prudence in the immediate expenditure of his labor and means in actually working the property and exploiting the mineral with a reasonable prospect of success in developing a paying mine. In other words, in order to have a valid discovery the mineral deposit that has been found must have a present value for mining purposes. An occurrence of mineral that simply warrants the further expenditure of labor and means in prospecting or exploration in an effort to ascertain whether the mineralization that has been found is sufficient (or whether other mineralization might be found that might be sufficient) to justify the actual working of the property and the extraction of the mineral with a reasonable prospect of financial success does not constitute a valuable mineral deposit within the purview of the mining laws. The test is whether the facts warrant the development of the property, and not whether the facts warrant prospecting or exploration in an attempt to ascertain whether the property might warrant development.

The position that has been taken by the Department of the Interior on the question of what constitutes a discovery of a valuable mineral deposit is consistent with the constructions of the Supreme Court from 1888 to the present and the recent interpretations of the lower federal courts. In United States v. Mrs. Frances Swain, A-30926, decided December 30, 1968, the Department stated:

> What is the "prudent man" test basically? It is, in essence, an inquiry into the economic feasibility of a proposed mining operation on the mining claim in question. The inquiry necessarily begins with the question of the quality and the quantity of the mineral present on the claim and thereafter turns to an evaluation of the evidence relating to quality and quantity in the light of other pertinent factors (p. 6)

* * *

9/ The decision in this case was originally issued on May 24, 1968. The case was subsequently re-argued before the court sitting en banc. On rehearing the court held the mining claimant's contentions to be without merit and adhered to its original opinion.

> In order to constitute a "valuable mineral deposit," minerals must be found within the limits of a mining claim which are presently valuable in an economic sense. Thus, the relationship between the values of minerals which have been found and the cost of their extraction and transportation to market is a matter of prime importance in determining whether or not there has been a "discovery" of a "valuable mineral deposit." (p. 6)

I conclude that in order to have a valid discovery of a valuable mineral deposit, minerals must be found, and the quantity and quality of the minerals must be such as to warrant a person of ordinary prudence in the expenditure at that time (and not possibly at some unknown time in the future) of labor and means in actually working the property. A valid discovery does not exist until sufficient prospecting or exploration work has been done to enable one to reach an informed decision that the particular mineralization justifies as a present fact the expenditure of money for the development of a mine and the exploitation of the mineral.

When a Valid Discovery Must Exist

Where land is closed to acquisition under the mining laws subsequent to the location of a mining claim, the validity of the claim can be recognized only if the claim was supported by a valid discovery prior to the withdrawal of the land from mineral entry. See Cameron v. United States, 252 U.S. 450, 456 (1919); United States v. McCutchen, 238 Fed. 575, 579 (1916); United States v. Frank Coston, A-30835 (February 23, 1968); United States v. Warren E. Wurts et al., 76 I.D. 6 (1969). This principle was applied in the Departmental decision in United States v. C. F. Snyder et al., supra, and recognized by the courts in Snyder v. Udall, supra, and Udall v. Snyder, supra.

By an Act of May 27, 1955, 69 Stat. 67, 25 U.S.C. 396a-396f, Congress withdrew all tribal lands within the Papago Indian Reservation, including the lands covered by the contested claims, from all forms of exploration, location and entry under the mining laws. The Act saved any "claim that has been validly initiated before the date of this Act and thereafter maintained under the mining laws of the United States."

Accordingly, as stated in the Departmental decision in United States v. Stella Wagnon Wilson, A-30787 (July 23, 1968), which involved lands within the Papago Indian Reservation: