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I. INTRODUCTION

Rule of man in the public land agencies of the United States has become a despotism called administrative law. No longer limited by the Constitution or the doctrine of due process, administrative law in agencies with power over public land has quashed the property rights of the mining claim locator in deference to the encroachments of alternative public land users. Administrative law has denied any value to a mineral prospect, imposed large company economics on the successful mining operations of lone miners and their families, and made a mockery of mining knowledge and mining law.

The property rights of the mining claim locator are common law rights of the most basic sort which Congress enacted as the American Mining Laws in 1872.[1] These laws proceeded from the idea that the public domain belonged to the people and that the mineral was to be privately acquired as a reward for discovery, occupation and development work. From that premise the adventurers who invaded California in 1849, seeking gold and

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1. An Act to promote the Development of the mining resources of the United States, ch. 152, 17 Stat. 91 (1872) (current version at 30 U.S.C. ch. 2 (1970)).

seizing a lawless territory, necessarily adopted certain rules to bring order. So well did their laws make order and aid in accomplishing the task of finding and developing the country's minerals that those rules became models for mining districts all over the public domain,[2] and the United States became a formidable mineral power indebted to their effectiveness.

Although many millions of acres remain open to mineral entry under the mining laws, stockraisers, land developers, "environmentalists," and a greedy government are slowly erasing the small mineral developer from the land. The administrative regulation being used in the land agencies does not recognize the legal property rights of the mining claim locator or even attempt token compensation to a claim locator when other more powerful non-mineral appropriators or government departments desire the public domain. In effect the American mining laws have been revoked, not by Congress, but by what this writer calls the "rule of man," that is, whichever man controls the Forest Service and the Bureau of Land Management. Congress, largely via the Multiple-Use Sustained-Yield Act of June 12, 1960,[3] and the courts, via tacit acceptance of limited judicial review,[4] have surrendered their constitutional powers and duties to agencies which have been slowly prosecuting, convicting and eliminating mining claim prospectors and the men who attempt to live under the mining laws.

The administrative law courts, entrusted to land agencies because of their supposed expertise in matters of mineral development, have made due process virtually inaccessible to the average citizen or mining claim locator. The courts and Congress have been so successfully bypassed by means of these administrative courts that the Solicitor for the Department of the Interior, sworn to administer the law, openly admits that he will do everything in his power to change the mining laws. He would propose that some form of leasing similar to that now governing oil, gas and some non-metallic minerals would be a superior system.[5] In view of shortages and foreign dependencies recent to both oil and gas, it is not unreasonable to question the agency's supposed expertise in these matters.

2. G. COSTIGAN, HANDBOOK ON AMERICAN MINING LAW § 2 (1908).

3. Multiple-Use Sustained-Yield Act, 16 U.S.C. § § 528-29 (1970).

4. Coleman v. United States, 363 F.2d 190 (9th Cir. 1966), *rev'd on other grounds,* 390 U.S. 599 (1968).

5. Address by Leo M. Krulitz, Solicitor for Department of Interior, Northwest Mining Association 84th Annual Convention (Dec. 1, 1978) "Hard Rock Mineral Policy in the Carter Administration." *See* Address by Keith R. Knoblock, spokesman for American Mining Congress, Northwest Mining Association 84th Annual Convention (Dec. 1, 1978) (Knoblock stated, "The repeal of the mining law is a major goal for the Carter Administration." Krulitz did not protest).

The incentive system in the American Mining Law recognizes that prospecting and mining is a gambler's work. In fact, it is frequently the case that more money has gone into exploration for and development of any particular mineral than has been extracted in mineral wealth in this country.[6] By nature, developing a mine is a gambler's business for which scientists can only contribute probability, not certainty. Almost every existing mine in this country has been built on a prospector's perseverance and on trust in the mining laws by a multitude of less successful prospectors.

In the early days of the law, the prospector and his finance, or grubstake, could rely on his government to allow the law to function. When the railroads and highway builders moving across the country attempted to devalue the mineral prospector's work and worth, they were stopped in the courts by the mining law because the courts were still then available to the miner and prospector. Years of administrative procedure and expense did not intervene, and the uncertainty of the value of mining land did not deprive it of a value.[7] When the powerful railroads attempted to take the prospector's claim with no compensation, due process, in which a jury of the claimant's peers could hear the facts and evaluate his good faith, was still available to a mining claim locator.

Today the government and its land agencies hire a bevy of geologists and other experts whose jobs depend on their agreement with agency intent and policy. It has been their job to deride the prudence of the miner and prospector and to contradict the opinions of mining men and scientists who say the challenged prospector or miner has a discovery of value. The pivotal issue is no longer the claimant's good faith but an evaluation of his discovery. This is because the land agencies cannot hire an expert in divining the intentions of a man, making bad faith hard to prove. As a result the term "discovery" has been masticated by the lawyers while the issue of good faith has gone unchallenged and conclusively presumed against the mining claim locator, denying him due process.[8]

II. MINERAL DISCOVERY

The sole statutory authority for mining claims is that "all valuable mineral deposits in lands belonging to the United States. .

6. H. Tognoni, Capital Return or Legislative Grace 15 (1952) (University of Idaho graduate research study printed by Hecla Mining Company).

7. Montana Ry. Co. v. Warren, 137 U.S. 348, 352-53 (1890). *See also* J. ADAMS & D. BARRINGER, THE LAW OF MINES AND MINING IN THE UNITED STATES 188 (1900).

8. Zeigler v. South & North Ala. R.R. Co., 58 Ala. 594, 599 (1877).

. shall be free and open to exploration and purchase. . . . "[9] The earliest articulate case interpretation of the words "valuable mineral deposits" in this statute is *Book v. Justice Mining Co.*[10] Experts testified at length that the cost of removal of porphyry copper was too high to allow the ore to be marketed at a profit. The court, however, held the discovery to be good and explained its disregard for the expert testimony by posing the following hypothetical case:

> A vein or lode of quartz or other rock in place, bearing gold and silver, is found upon the side of a hill or mountain. It is within well-defined walls, and the rock assays from $1 to $15 per ton. The cost of extracting, removing and milling the ore is $20 per ton. The miner making the discovery is aware of this fact but he knows or has good reason to believe from his own knowledge, gained by years of experience, that, within or along the veins or lodes of that particular district, places are liable to be found that may prove to be of much greater value, and that the ore is liable to be richer at a greater depth than it is upon the surface. Now, in such a case, can it be reasonably claimed, under the provisions of the mining laws, that a person making the discovery — a discovery which, in good faith, induces him to locate the vein or lode, and to commence the running of a tunnel into the hill or mountain for the purpose of properly working and developing the ground, and complying with all of the provisions of the law, after he has expended thousands of dollars in labor and improvements upon the same — can be deprived of his location by the fact that other persons, subsequent to his discovery and to his location, went upon the hill 500 or 1,000 feet distant from the place where he had found and prospected the lode, but within the limits of his location, and there, by sinking a deeper shaft upon the same lode, found ore which assayed over $40 per ton, — enough to insure a profit to the owners — and thereupon located the ground? This may be an extreme case, but it fairly illustrates the theory, for, according to the testimony of several of complainants' witnesses, the latter location would be valid, and the prior

9. Mineral Lands & Mining, 30 U.S.C. § 22 (1970).
10. 58 F. 106 (C.C.D. Nev. 1893).

> location invalid. *The act of congress is not susceptible of any such construction. It does not impose any conditions as to the value or the extent of the ore.* It simply provides that "no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located."[11]

The next noteworthy decision defining necessary discovery was *Castle v. Womble.*[12] The "prudent man test" therein has been followed by the Supreme Court in numerous decisions[13] and has become the settled law of the land. The customary quote in citing *Castle v. Womble* defines discovery as being "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."[14] The foregoing quote is lifted, however, from a paragraph which goes on to say as follows:

> 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 any time during exploration, before the returns become renumerative, the lands are to be subject to other disposition, few would be found willing to risk time and capital in an 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.[15]

This caution in *Castle v. Womble* is left out of current citations of the "prudent man test." The administrative courts have forgotten it. Decisions of these courts and the policy which controls them would be in direct conflict with decisions using the "prudent man test" as it was intended. One court stated:

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11. Book v. Justice Mining Co., 58 F. 106, 124-25 (C.C.D. Nev. 1893). (emphasis added).
12. Castle v. Womble, 19 Pub. Lands Dec. 455 (1894).
13. *E.g.*, Cameron v. United States, 252 U.S. 450 (1920); Chrisman v. Miller, 197 U.S. 313 (1905).
14. 19 Pub. Lands Dec. at 457.
15. *Id.*

> [In] respect to placer claims, if a competent locator actually finds upon unappropriated public land petroleum or other mineral in or upon the ground, and so situated as to constitute a part of it, it is a sufficient discovery, within the meaning of the statute, to justify a location under the law without waiting to ascertain whether the ground contained the mineral in sufficient quantities to pay.[16]

The prudent man test has been stated by another court as follows:

> In a case where the question of discovery is directly involved, all that is necessary for the locator to show is that he has made such a discovery as would justify a reasonably prudent person in the expenditure of money and labor in developing the claim with the reasonable expectation of finding minerals in paying quantities.[17]

In further recognition of the uncertainties inherent to mineral discovery, the government once took into consideration not only the mineral found, but other important factors: whether the land is within an established mining district; its proximity to working mines; geological conditions; verification by experienced miners and geologists; and good faith.[18] All of these factors have been supplanted by what has become known as the "marketability test."

III. MARKETABILITY OF A MINERAL DISCOVERY

If a locator's claim is challenged today by the Forest Service or by the Bureau of Land Management, he stands little chance of seeing his claim judged by common law standards for discovery. Instead he must fight years of administrative law battles with agencies which insist that his claim pass the marketability test. In *U. S. v. Coleman,*[19] the Supreme Court calls the marketability test a refinement of the prudent man test. But the use to which the administrative courts have put this test goes far beyond the sanction and intent of the Supreme Court in *Coleman.* While giving approval

16. Nevada Sierra Oil Co. v. Home Oil Co., 98 F. 673, 676 (C.C.S.D. Cal. 1899).
17. United States v. Pan Am. Petroleum Co., 45 F.2d 821, 831 (S.D. Cal. 1930). *See, e.g.,* 1 AMERICAN LAW OF MINING § 4.26 (Rocky Mtn. Min. L. Found. ed., 1977).
18. 45 F.2d at 830.
19. 390 U.S. 599, 603 (1968).

to the administrative test, the Supreme Court in that case also recognized that the marketability test was not necessary to all mineral discoveries.

> [We] think that the Court of Appeals' objection to the marketability test on the ground that it involves the imposition of a different and more onerous standard on claims for minerals of widespread occurence than for rarer minerals which have generally been dealt with under the prudent-man test is unwarranted. As we have pointed out. . . the prudent-man test and the marketability test are not distinct standards, but are complementary in that the latter is a refinement of the former. While it is true that the marketability test is usually the critical factor in cases involving nonmetallic minerals of widespread occurrence [*i.e.*, common varieties], this is accounted for by the perfectly natural reason that precious metals which are in small supply and for which there is a great demand, sell at a price so high as to leave little room to doubt that they can be extracted and marketed at a profit.[20]

While *Coleman* recognizes the marketability test, it also recognizes the limitations of that test. As criteria for judging discoveries of common varieties of mineral (which had to be patentable by July 23, 1955, when common varieties could no longer be located under the mining laws) the marketability test is within the bounds of common law tests for mineral discovery. In *Coleman* the Supreme Court did not foresee or intend the use to which the administrative courts have since put the marketability test; nor, perhaps, did the Court understand the undesirable consequences which that test had already had on small prospectors and miners of the precious metals the Court thought natural causes would exempt from the clench of marketability. Where *Coleman* cleared from the land a claimant who had spent thousands of dollars building a home on 720 acres of scenic national forest with no economically feasible market for the common quartzite through which he sought mineral patent, the land agencies have used that same test to harass and eliminate bona fide mining claimants who, unlike Alfred Coleman, were not seeking patent at all.

20. United States v. Coleman, 390 U.S. 599, 603 (1968).

The marketability test was designed to administer the Common Varieties Act of July 23, 1955.[21] It was to curb use of the general mining law by persons who were locating mining claims on public land for purposes other than legitimate mining activity. The act removed common types of sand, gravel and stone from the coverage of the mining laws to place the disposition of such materials under the Materials Act of 1947, providing for the sale of the common varieties without disposing of the land on which they were found.[22] The marketability test was not designed for the bona fide small prospector and miner who is not even seeking patent. For him, meeting the marketability test is normally outside the realm of possibility. The marketability test as administered by the land agencies does not comprehend that a claim may sustain just one man working at mineral development.[23]

The land agencies use the marketability test to invalidate and avoid compensating[24] mining claimants of common and uncommon varieties of mineral alike, of precious metals as well as of non-metallic minerals whether those non-metallics be widespread or uncommon in occurrence. Often the victims are made prey to the marketability test by the fact that they are exercising their legal right under the mining laws to maintain and occupy a cabin[25] while they are engaged in the development or mining of the mineral which led them to locate their mining claims.[26]

The small miner or locator is most often the marketability test's victim due to a common government practice of accommodating the marginal mining claims of large mining companies with land trades. Through this means the wealthy

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21. 30 U.S.C. §§611-15 (1971).

22. H. R. REP. No. 730, 84TH CONG., 1ST SESS., *reprinted in* [1955] U. S. CODE CONG. & AD. NEWS 2478.

23. *See, e.g.*, United States v. Crawford, A-30820 (I.D., Jan. 29, 1968); United States v. Fairchild A-30803 (I.D., Jan. 19, 1968); United States v. Mosely, A-30791 (I.D., Dec. 13, 1967); United States v. Edwards, 9 I.B.L.A. 197 (Jan. 29, 1973).

24. United States v. Boyle, 519 F.2d 551 (9th Cir. 1975). Ignoring pre-1955 production and an obvious market, the claims were ruled invalid because the mineral was found to be a common variety in land agency hearings. Runways at Williams Air Force Base had been built with decomposed granite from the Boyle claims prior to 1955. At the hearing, the government mineral examiner stated that the Forest Service would sell the material itself after the defendants were removed. *See also* United States v. Johnson, I.B.L.A. 78-507 (Feb. 28, 1979) (prior to the complaint against a part of the discovery, a highway department sales agreement had been negotiated with the claimants); Flood Control Dist. of Maricopa County v. Melluzzo, Civ. No. 345729 (Super. Ct. Maricopa County, Ariz., filed Feb. 7, 1977) (lode claims), and Civ. No. 345728 (Super. Ct. Maricopa County Ariz., filed Feb. 7, 1977) (placer claims).

25. See Valcalda v. Silver Peak Mines, 86 F. 90 (9th Cir. 1898). *See also* A. MORRISON, MINING RIGHTS ON THE PUBLIC DOMAIN 294-95 (16th ed., 1936).

26. *See generally* cases cited Note 23 *supra*. The Forest Service bulldozed Fairchild's cabin and burned Mosely's cabin. Mosely sued for damages and the Forest Service paid because his cabin was not on the invalidated claim. Mosely v. Brewer, Civ. No. 1205-PCT (Dist. Ct. Yavapai County, Ariz., filed Nov. 4, 1970) (settled Jan. 4, 1971).

mining company, which the government threatens with costly challenges in the administrative courts, may buy up private lands in areas where a land agency seeks to consolidate its ownership and trade them for patent on the desired public lands.[27]

IV. THE UNSPOKEN ISSUE OF GOOD FAITH

Most of the mining claim challenges brought by government agencies are against claims for which the locator does not yet seek patent or exclusive title. In such cases the proceedings are of questionable legal significance. Such challenges fail to quash the *pedis possessio* rights of the claimant who is proceeding in good faith. After a mining claim has been voided by a land agency, the claimant is not barred by law from access and further exploration.[28] Under the mining laws a claimant's possessory right is untouchable so long as he remains in good faith and performs the required annual assessment work. Neither the questions of good faith nor work performed, however, are usually in dispute in land agency contests. Generally speaking, these contests against mining claim discovery are simply government harassment sanctioned under administrative law.

The classic case on the topic of *pedis possessio* or a mining claimant's possessory rights is *Union Oil Co. v. Smith.*[29] In it the Court makes the important distinction between a claimant seeking exclusive title against the United States and the rights of a locator who is exploring a claim in good faith but does not yet seek patent.

> [It] is clear that in order to create valid rights or initiate a title as against the United States a discovery of mineral is essential. . . nevertheless, § 2319 extends an express invitation to all qualified persons to explore the lands of the United States for valuable mineral deposits, and this and the following sections hold out to one who succeeds in making discovery the promise of a full reward. Those who, being qualified, proceed in good faith to make such explorations and enter peaceably upon vacant lands of the United States for that purpose are not treated as mere trespassers, but as licensees or tenants at

27. *See generally* Records of United States Forest Service, Regional Office, Dept. of Agriculture, Albuquerque, N.M. (Re: Tonto Nat. Forest, Pinto Valley operations of City Services, Miami, Ariz.; Prescott Nat. Forest, Copper Basin operations of Phelps Dodge Corp., Prescott, Ariz.).

28. Barrows v. Hickel, 447 F.2d 80, 83 (9th Cir. 1971).

29. 249 U.S. 337 (1919).

> will. For since, as a practical matter, exploration must precede the discovery of minerals, and some occupation of the land ordinarily is necessary for adequate and systematic exploration, legal recognition of the *pedis possessio* of a *bona fide* and qualified prospector is universally regarded as a necessity. . . .
>
> And it has come to be generally recognized that while discovery is the indispensable fact and the marking and recording of the claim dependent upon it, yet the order of time in which these acts occur is not essential in the acquisition from the United States of the exclusive right of possession of the discovered minerals or the obtaining of a patent therefor, but that discovery may follow after location and give validity to the claim as of the time of discovery, provided no rights of third parties intervened. . . .
>
> In the California courts the right of a locator before discovery while in possession of his claim and prosecuting exploration work is recognized as a substantial interest, extending not only as far as the *pedis possessio* but to the limits of the claim as located; so that if a duly qualified person peaceably and in good faith enters upon vacant lands of the United States prior to discovery but for the purpose of discovering oil or other valuable mineral deposits, there being no valid mineral location upon it, such person has the right to maintain possession as against violent, fraudulent, and surreptitious intrusions so long as he continues to occupy the land to the exclusion of others and diligently and in good faith prosecutes the work of endeavoring to discover mineral thereon. . . .[30]

United States v. Deasy[31] is particularly germaine to *pedis possessio* in the context of "rule of man" versus the mining laws. The court held the possessory title to a mining claim good against all—including the U.S.—as long as the locator complies with the law. Contests initiated by the United States against unpatented mining claims which, in good faith, have been maintained and developed under the provisions of law cannot be challenged under the rule of law for lack of economic discovery. If land agencies

30. Union Oil Co. v. Smith, 249 U.S. 337, 346-47 (1919).
31. 24 F. 108 (D. Idaho 1928).

propose other uses than mining for the land, the only legal question is how much to compensate the bona fide mining claimant.[32]

The case, *United States v. Crawford,*[33] however, is an instructive example of the major ills which have befallen the mining laws. In *Crawford,* the Forest Service requested a mineral examination because Crawford was using the millsite to which he was entitled by statute[34] "as a base of operations from which Mr. Crawford could conduct his prospecting."[35] Mineral examination resulted in a contest against one of Crawford's three lode mining claims and against the millsite adjacent to it. Crawford could not prove that the ore he had so far uncovered and, in fact, milled met the standards of the marketability test and administrative law. Geologists and mining experts testifying in his behalf supported his prudence in following the vein, and they substantiated the fact that mines with veins similar to Crawford's had led to large discoveries and the development of paying mines in the vicinity. Predictably, however, Crawford's discovery on the one lode claim was invalidated. Crawford appealed through the proper administrative offices and then took his case to the courts. On May 10, 1971, the Ninth Circuit found substantial evidence in the record to support the ruling of the Secretary of the Interior on discovery.[36]

Meanwhile Crawford still had his other two mining claims to support his right to the millsite. Because the land remained open to mineral entry, he also continued to prospect in the area of his invalidated claim in accordance with his rights of *pedis possessio* as a mineral entryman in good faith. But on November 13, 1974, the United States filed a suit in ejectment[37] against Crawford and a motion for summary judgment claiming that Crawford was in bad faith possession and use of the millsite. That motion was granted even though there existed a genuine issue as to material fact on the issue of bad faith,[38] and even though questions of intent are inappropriate for summary judgment.[39] In an unrelated case, one court has stated the rule as follows:

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32. *See generally* cases cited in THE LAW OF MINES AND MINING IN THE UNITED STATES *supra* note 7, at 188-93.

33. Civ. No. 74-753-PHX-WEC (D. Ariz., 1978).

34. Mineral Lands & Mining, 30 U.S.C. § 42(a) (1971). *See also* 30 U.S.C. § 612 which states that "[A mining claim] shall not be used, prior to the issuance of a patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto."

35. Forest Service Trespass Report, United States v. Crawford, Civ. No. 74-753-PHX-WEC (D. Ariz., 1978).

36. Mosely v. Hickel, 442 F.2d 1030, 1031 (9th Cir. 1971).

37. United States v. Crawford, Civ. No. 74-753-PHX-WEC (D. Ariz., 1978).

38. *See, e.g.,* Dawn v. Sterling Drug, Inc., 319 F. Supp. 358 (C.D. Cal. 1970); Red House v. Quality Ford Sales, Inc., 511 F.2d 230 (10th Cir.) *remanded on rehearing,* 523 F.2d 1 (10th Cir. 1975).

39. *See* Staren v. American Nat. Bank & Trust Co. of Chicago, 529 F.2d 1257 (7th Cir. 1976); Fitsimmons v. Best, 528 F.2d 692 (7th Cir. 1976).

> [The] complaint presented questions of fact to be determined by the trial court as to the good or bad faith of the locator, in filing the mining claim, and the good or bad faith of the possessor as to uses to which it was being put and that these were evidentiary questions which the district court had jurisdiction to decide, and should have decided on a factual hearing.[40]

Crawford could not afford to appeal the case, and was subsequently evicted from the land.

V. A WRONG WITHOUT A REMEDY

It is widely supposed that decisions regarding mining claim rights are of a technical nature. Yet "[the] standards to be applied in determining what a prudent prospector would or would not do are not those of a trained engineer or geologist and are not even necessarily determined by the prudence of a skilled miner."[41] Nothing in the background and experience of the ordinary expert, asked in land agency hearings to invalidate a claimant's discovery, would give him any special knowledge of what a prospector of ordinary prudence would or would not do in attempting to develop a mine. The government expert's credentials as a scientist are largely irrelevant to the legal issue, and the technicalities of science are not pivotal considerations under the mining law. "The definitions by the courts are not the definitions of geologists; and the terms are to be considered as used in the signification which they convey to the practical miner, and not in the sense generally used by the scientific man."[42] Nonetheless, the overcrowded courts resist hearing mining contests partly because the subject matter is of a technical nature. Yet technical information and the evaluation of it, in and of itself, will not necessarily dictate the decision made.

Meanwhile, experts for the government and for the claimant sit in administrative hearings basically concurring on the factual information of a technical nature. Their disagreements are on issues of law and economic forecast[43] — issues which, when committed to administrative discretion, spell "rule of man" and not "rule of law." The mining engineers and geologists hired by the government are commonly asked if in their opinions the mining

40. United States v. Nogueira, 403 F.2d 816, 823 (9th Cir. 1968).
41. Chrisman v. Miller, 197 U.S. 313, 323 (1905).
42. Henderson v. Fulton, 35 Pub. Lands Dec. 652, 662 (1907).
43. *See, e.g.*, Multiple Use, Inc. v. Morton, 504 F.2d 448 (9th Cir. 1974).

claimant could make a profit by mining the exposures found by them. When the claim is still being explored or developed, the government expert's answer is, of course, "No." He then offers the legal opinion that there is no discovery on the claim. In one recent case, a government expert went into a land agency hearing prepared to offer that opinion with no experience in taking placer samples.[44] Concerning marketability, opinions of men not in an area until ten years after a crucial date have rebutted factual proof of production and sales.[45]

If a mining claimant has not given up hope during years in administrative contest and appeal; if he has not been dismissed by inability to pay a filing fee[46] or meet a filing date;[47] if he has not been put out of business by ruthless land agency tactics;[48] and if he has not been driven to distraction by some utterly impossible land agency requirement,[49] he may finally see a court of law. The courts, however, have deferred to the Department of Interior's insistance that judicial review of Department decisions be limited.

> Some years back. . . it was broadly contended that the Administrative Act does not apply to Decisions of the Secretary of the Interior. . . Next the Secretary has argued that the determination of a question of fact by the 'Secretary of Interior, or his authorized representative, is conclusive in the absence of fraud or imposition' and that 'decisions of the Secretary of Interior with respect to public lands have historically been accorded a conclusiveness beyond that of typical regulatory agencies.' These are not the standards for review

44. United States v. Hett, No. 9848 (I. D., Ad. Law Judge, March 1, 1979) (joint sampling ordered).

45. *See* United States v. Boyle, 519 F.2d 551 (9th Cir. 1975), United States v. Johnson, I.B.L.A. 78-507 (Feb. 28, 1979).

46. United States v. Synbad, I.B.L.A. 75-1011 (Feb. 25, 1976).

47. United States v. Haskins, 505 F.2d 246 (9th Cir. 1974).

48. *See* United States v. McCormick, I.B.L.A. 72-216 (Sept. 29, 1976). With neither mining nor legal advice, a Forest Ranger decided the claims were null and void because the mineral was, in his opinion, a common variety. He chained off access to the claims and interrupted the sale of material. After land agency hearings, the material was ruled to be special and distinct under the provisions of Public Law 167, but the Forest Service appealed. For four years thereafter, while the case was in the Department of Interior on appeal, the Forest Service attempted to influence McCormick's customers against using his materials.

See WJM MINING & DEV. CO., INC. v. MORTON, Civ. No. 70-679 (I.D. July 31, 1969). United States v. Melluzzo, 76 I.D. 181. Prior to hearing in the Bureau of Land Management, the government succeeded in interfering with claimant's sales by telling customers that the company's building stone was stolen. On record is a mineral examiner's threat to put that "wop" (Frank Melluzzo of WJM) back to washing windows.

49. *See* United States v. Brattain Contractors, Inc. I.B.L.A. 78-55 (Oct. 18, 1978). On five miles of the Hassayampa River with documented gold content and production records, the Department ruled that the owner has to have proof that the ancient locators, all dead, knew there was gold there, or had made a discovery. *Id.*

> provided in the Administrative Procedure Act adopted in 1946 [5 U.S.C. 1009(e)].[50]

Abiding by the Department of Interior's wishes, the courts refuse to grant *trials de novo* and confine themselves to considering whether there is substantial evidence in the record to support the land agency's invalidation. They regularly find that they "have no warrant to review the evidence as to its weight and credibility."[51] Consequently, meaningful review for the mining claimant is virtually non-existent.

VI. RULE OF MAN

Will the "rule of man" and administrative law continue in the direction which it has set for itself? Mineral wealth found and developed by our forefathers has not yet been entirely liquidated, so that the difficult decisions which man must make to survive can successfully be postponed while man plays God. Today the policy-makers are increasingly the environmentalists. If it can be fairly said that the industrialists preceded them, then at least they did not clothe themselves in self-righteousness; their weaknesses were of a more earthly sort. Non-elective organizations like the Natural Resources Defense Council (a group of lawyers) are increasingly utilizing their powers in Washington, and directors of Sierra Club legal defense have assumed official powers in the Department of the Interior.[52] Both of these groups despise mining. The men of these groups have been privileged to live on the land rather than from it.

Were the California prospectors and miners who originated the mining laws clairvoyant in their distrust of lawyers? Those miners proposed whipping and banishment as the punishment for any man caught practicing the profession of law. The utopian vision of these lawyers and lawmakers, if vision guides them, is plain in the inescapable results of a new law with a section entitled "Authorization to Sell Reserved Mineral Interests to Surface Owners."[53] This authorization is a supposed solution to the conflicts between developers and persons or companies prospecting

50. Coleman v. United States, 363 F.2d 190, 194 (9th Cir. 1966), *rev'd on other grounds*, 390 U.S. 599 (1968).

51. 504 F.2d 448. *See* United States v. Thomas, 552 F.2d 871 (1977) (holders of grazing rights succeeded in having the Department of the Interior invalidate Thomas' claims for lack of discovery and, at that point, dynamited his location monuments and filed mining claims of their own).

52. Metzger, *The Coercive Utopians: Their Hidden Agenda*, Denver Post, April 30, 1978, § B.

53. Federal Land Policy and Management Act of 1976, Pub. L. 94-579, §209. Burdens the land regulations and kills incentive to develop the land and its minerals as a human habitat.

and mining under the mining laws. A portion of the statute reads as follows:

> (3) Before considering an application for conveyance of mineral interests pursuant to this section —
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> (i) the Secretary shall require the deposit by the applicant of a sum of money which he deems sufficient to cover administrative costs including, but not limited to, costs of conducting an exploratory program to determine the character of the mineral deposits in the land, evaluating the data obtained under the exploratory program to determine the fair market value of the mineral interests to be conveyed, and preparing and issuing the documents of conveyance: Provided, that, if the administrative costs exceed the deposit, the applicant shall pay the outstanding amount; and, if the deposit exceeds the administrative costs, the applicant shall be given a credit for or refund of the excess; or
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> (ii) the applicant. . . shall have conducted. . . such an exploration program, in accordance with standards promulgated by the Secretary.[54]

The basic reality of this statute is that surface developers of modest means do not have the money or time to undertake a comprehensive mineral exploration program if, in fact, any surface developer does. The statute still does not serve the cause of orderly development of our natural resources, but it does achieve another end — the proliferation of land agency power. Only the agency will determine how extensive an exploration program must be, and it would be unrealistic to believe that favored surface developers will not have an easier time of it. There is no equality in the eyes of administrative law.

Just as the larger mining companies have found ways to accommodate the land agencies and administrative law, so they will most likely survive this statute. But will the country's mineral development be sufficiently provided by large mining companies alone? Since large and successful mines have a stake in the scarcity which keeps their prices up, a large mining company has a conflict of interest with national mineral development. Future steps to nationalization of the country's mines are not difficult footprints to discern. That will be the ultimate victory for administrative law.

54. Id.

The "Authorization to Sell Reserved Mineral Interests to Surface Owners" ignores two already existent solutions to the conflicts in surface development with reserved mineral rights. The land developer is, like any other citizen, free under the mining laws to locate mining claims in good faith. He must do the required annual assessment work thereafter, but such assessment work provides for exploration and development work on a gradual and continuing basis,[55] which is precluded by selling the mineral rights at a point in time when an existent mineral value may be much lower than the value future circumstances and developments could realize. The second solution possible under present mining laws is a withdrawal of the land from mineral entry. If the surface development of public land is desirable, Congress has the power to withdraw that piece of land from mineral entry.

But just as the courts have found it easier to entrust the mining laws to land agencies, so the Congress puts up little resistance to easing its responsibilities with regard to withdrawing public land from mineral entry. The despotism of administrative law fills the void at the expense of all the practicality inherent in American mining law. Without the mining laws, which are our heritage, we will be without a true and tested system of mineral development. Administrative law is already without representation from mineral development people, without judicial control, and without the immediate desire to develop minerals. Lacking these, the liquidators of our mineral wealth can not truly concern themselves with a better system. A triumph for the "rule of man" in the Department of the Interior is no triumph for Man.

55. Mining Law, 30 U.S.C. §28 (1872); *See generally:* MINING RIGHTS ON THE PUBLIC DOMAIN, *supra*, note 25, at 108-137.