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Andrus v. Shell Oil Co.: The Marketability Standard and the Oil Shale Exception

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ANDRUS V. SHELL OIL CO.: THE MARKETABILITY STANDARD AND THE OIL SHALE EXCEPTION

In *Andrus v. Shell Oil Co.*,[1] the United States Supreme Court affirmed a Tenth Circuit decision which had held that a future marketability standard applies to oil shale claims located prior to 1920.[2] In so holding, the Supreme Court created an exception to the present marketability standard established in *Coleman v. United States*.[3] This comment will discuss the factual and legal background of the case and examine the Supreme Court's reasoning; furthermore, the comment will analyze the soundness of the Court's rationale and offer some policy considerations relating to the effect of the decision on the oil shale leasing program.

I. FACTUAL AND LEGAL BACKGROUND

In 1872, Congress passed the General Mining Law,[4] opening up large areas of federal lands to private entrepreneurs in order to promote the exploration and development of American mining resources. The requirements for a private citizen to obtain a mineral patent are minimal. One requirement is that the claim be maintained through yearly assessment work until such time as a patent for the particular claim issues from the government. Assessment work is defined as work to improve the mining claim, which cannot be "less than $100 worth of labor . . . or improvements made during each year."[5] Furthermore, the patent may issue only upon a showing that

1. 100 S. Ct. 1932 (1980).

2. Shell Oil Co. v. Andrus, 591 F.2d 597 (10th Cir. 1979). For a history of the protracted litigation leading to this decision, as well as an analysis of the Tenth Circuit's reasoning, see Overview, *Lands and Natural Resources, Sixth Annual Tenth Circuit Survey*, 57 DEN. L.J. 293, 293-96 (1980).

3. 390 U.S. 599 (1968).

4. Act of May 10, 1872, ch. 85, 17 Stat. 91 (current version at 30 U.S.C. §§ 22, 26, 28, 29 (1976)).

5. 30 U.S.C. § 28 (1976). The $100 assessment work requirement, although not an issue in this case, has presented problems for oil shale locators. In 1920, immediately preceding passage of the Mineral Leasing Act, speculators rushed to locate oil shale claims on the public lands under the provisions of the Mining Law. *See* Hickel v. Oil Shale Corp., 400 U.S. 48, 54 (1970). Although the Mineral Leasing Act of 1920 removed oil shale from the category of minerals locatable under the Mining Law, the Act included a saving clause whereby valid pre-Act claims were preserved so long as they were maintained in accordance with the law. *Id.* at 51. Because the Act removed the possibility that oil shale locations be usurped by subsequent locations or by subsequent challengers to pre-Act oil shale claimants, and because the pre-Act law prohibited the federal government from challenging the validity of mining claims because of claimant's failure to do assessment work, oil shale speculators became less diligent in their asessment work. *See* Udall v. Oil Shale Corp., 406 F.2d 759 (10th Cir. 1969), *rev'd in* Hickel v. Oil Shale Corp., 400 U.S. 48 (1970).

The Interior Department challenged the validity of oil shale claims for failure of claimants to do the statutorily required assessment work. In United States v. Krushnic, 280 U.S. 306 (1930), and again in Ickes v. Virginia-Colorado Development Corp., 295 U.S. 639 (1935), the Supreme Court declared that the 1920 Mineral Leasing Act had not altered the pre-Act law insofar as it pertained to the authority of the government to challenge mining claims for insufficiency of the assessment work. Interior acquiesced to the Court's pronouncements, for a while.

In the 1960's, however, Interior again challenged certain mining claims involving oil shale the claimant has expended a total of $500 on the development of the claim.[6]

In addition to the improvement requirements, a mining location, to be patentable, must contain "valuable mineral deposits."[7] Since the enactment of the General Mining Law, determination of what constitutes a valuable mineral deposit has been the subject of much litigation and several Department of Interior decisions. Interior's first interpretation of the term came in the watershed decision of *Castle v. Womble*,[8] in 1894. In this decision, the Secretary of the Interior explained that "where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met."[9] This "prudent man" test established in *Castle v. Womble*, though later modified by the Supreme Court's *Coleman* decision, remains the standard by which Interior officials determine the existence of a valuable mineral deposit on mining claims.

Andrus v. Shell Oil Co. involved two groups of oil shale claims,[10] known as the Mountain Boy and Shoup claims, located on public lands in 1917 and 1918. Subsequently, in 1920, Congress amended the General Mining Law by enacting the Mineral Leasing Act.[11] The Leasing Act provided that certain public domain mineral lands, including oil shale lands, would no longer be available for location under the Mining Law, but the 1920 Act provided that the minerals under these public lands could be obtained through a newly-established departmental leasing system. The Leasing Act contained a saving clause, however, which preserved "valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be affected under such laws, including

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because of claimant's failure to do the required assessment work. The Tenth Circuit, per Judge Seth, was indignant with the Department and, citing *Krushnic* and *Virginia-Colorado*, upheld the validity of the oil shale claims. Udall v. Oil Shale Corp., 406 F.2d 759 (10th Cir. 1969).

In Hickel v. Oil Shale Corp., 400 U.S. 48 (1970), the Supreme Court, limiting *Krushnic* and *Virginia-Colorado* to their facts, reversed the Tenth Circuit and declared the oil shale claims to be invalid, as requested by the Department. The Court reasoned that, as the saving clause of the 1920 Mineral Leasing Act required the maintenance of pre-Act claims, including assessment work in substantial compliance with 30 U.S.C. § 28, as a condition for the continuing validity of the claims, Congress must have implied that the Department would have some means of enforcing the statutory provision. Asserting that statements to the contrary in *Krushnic* and *Virginia-Colorado* were dicta, the Court concluded that the failure of locators to do assessment work on oil shale claims gives the government the right to declare forfeiture. 400 U.S. at 52-58.

6. 30 U.S.C. § 29.

7. *Id.* at § 22. The discovery of a valuable mineral deposit is the prerequisite to the establishment of a valid mining claim.

8. 19 Pub. Lands Dec. 455, 457 (1894). *Accord*, Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335-36 (1963); Cameron v. United States, 252 U.S. 450, 459 (1920).

9. 19 Pub. Lands Dec. at 457.

10. The term "oil shale" is a misnomer, for the rock formations in which oil shale is found contain neither oil nor shale in its natural state. The rock is actually a marlstone which contains an organic matter called kerogen. When kerogen is heated to between 500 and 900 degrees Fahrenheit, it will yield a petroleum product which is approximately 66% liquid oil, plus a fuel gas and a coke-like solid. The oil obtained from the heating process is high in sulfur and nitrogen content and can be refined into products similar to crude oil. Note, *The Disputed Oil Shale Claims: Background and Current Conflict*, 51 MINN. L. REV. 1154, 1154 n.1 (1967).

11. Act of Feb. 25, 1920, ch. 85, 41 Stat. 437 (current version at 30 U.S.C. §§ 22, 48, 49, 171, 181-194, 201-209, 211-214, 221, 223-229, 229a, 241, 251, 261-263 (1976)).

discovery."[12] Oil shale claims were included in this saving clause, thereby entitling the Mountain Boy and Shoup claims to proceed to patent under the Mining Law.

At the time of its passage, the Mineral Leasing Act, with its saving clause, evoked few comments from congressmen; especially lacking were comments concerning the requirements for a valid discovery of oil shale. The purpose of the saving clause, according to Congressman Taylor of Colorado, was to prevent any federal department from denying a pre-1920 oil shale locator from the pursuit of a valid claim.[13] Three months after the enactment of the Mineral Leasing Act, Interior ruled that patentability of oil shale placer claims[14] was dependent upon a showing that the claims were valuable because of the oil shale deposits.[15]

In 1905, the Supreme Court had adopted the *Castle v. Womble* test in *Chrisman v. Miller*.[16] Thus, by 1920, there existed both an Interior ruling and a Supreme Court decision holding that a valuable mineral deposit was to be determined by the prudent man test. Yet, between 1920 and 1960, Interior periodically issued oil shale patents on the basis of another test, enunciated in 1927 by an assistant secretary of the Department, in *Freeman v. Summers*.[17] In *Freeman*, oil shale was declared to be a unique mineral, one which could be patented under the general mining laws based solely on its *future* marketability potential.[18]

The special future marketability test for oil shale remained in effect until 1964, when Interior re-examined the position taken in *Freeman* and determined that the *Freeman* future marketability standard was inconsistent with the mining statutes. This change in position prompted the Secretary of Interior to file complaints contesting the oil shale claims located in 1917 and

12. 30 U.S.C. § 193 (1976).

13. 59 CONG. REC. 2711-12 (1920). *See also* 59 CONG. REC. 2709 (1920); 58 CONG. REC. 4444, 4579-84 (1919).

14. "Placer claims" are those claims in which a deposit of valuable minerals is found loose, in sand or gravel, instead of in a vein. The term includes gulch claims, old channels, and drift diggings. The United States mining acts have categorized all minerals as either placer or lode claims. If a mineral deposit is "in place," or in a vein, it is a lode claim. E. DE SOTO & A. MORRISON, MORRISON'S MINING RIGHTS 252-53 (16th ed. 1936).

15. Instructions, 47 Pub. Lands Dec. 548, 551 (1920). The Department's policy statement is set forth:

> Oil shale having been thus recognized by the Department and by the Congress as a mineral deposit and a source of petroleum . . . 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.

16. 197 U.S. 313 (1905).

17. 52 Pub. Lands Dec. 201 (1927).

18. *Id.* at 206. The standard for determining the value of oil shale deposits, enunciated in *Freeman*, follows:

> While at the present time there has been no considerable production of oil from shales, due to the fact that abundant quantities of oil have been produced more cheaply from wells, there is no possible doubt of its value and of the fact that it constitutes an enormously valuable resource for future use by the American people.
>
> It is not necessary, in order to constitute a valid discovery under the general mining laws sufficient to support an application for [an oil shale] patent, that the mineral in its present situation can be immediately disposed of at a profit.

1918.[19] While Interior offered several reasons for its change of position on the validity of the pre-1920 oil shale locations, the most important rationale advanced was that no valuable mineral deposit existed within the claims when they were originally located.

The Secretary's protest was heard before an administrative law judge in 1967, but the decision was not rendered until 1970.[20] During this time, the Supreme Court, in *United States v. Coleman*,[21] modified the prudent man standard, as enunciated in *Castle v. Womble*, by introducing a *present* marketability requirement as a guide in determining the value of a mineral deposit. The "marketability test," an extension of the *Castle v. Womble* prudent man test, stated that, if the mineral could not be marketed at a profit *at the time of location*, the mineral deposit was not, in fact, valuable.[22] The administrative law judge examining the oil shale claims nevertheless held that he was bound by Interior's *Freeman* position and he adjudged that the validity of the pre-1920 oil shale claims was to be determined on the basis of the *Freeman* future marketability standard. It was clear from his opinion that, but for the *Freeman* decision, he would have found no valuable mineral deposits in the pre-1920 oil shale locations.[23]

Interior appealed the administrative decision to the Interior Board of Land Appeals (Board). The Board reversed the administrative law judge's decision on June 28, 1974,[24] reasoning that the original oil shale locators failed the test of value because there had been no present, reasonable prospect of successfully operating an oil shale mine, at a profit, at the time of location. It declined to consider the evidence presented by the claimants as to the speculative value of the oil shale. The Board overruled *Freeman* as being inconsistent with both the General Mining Law of 1872 and the 1920 amendments thereto.[25] Considering the reliance by the parties involved, the purposes of the statute, public policy, and the harm to both the government and the oil shale claimants, the Board held that the reversal of *Freeman* should be applied retroactively, invalidating both the Mountain Boy and Shoup claims.[26] The Secretary subsequently ordered that the claims be cancelled.

After cancellation, the oil shale claimants appealed to the United States District Court for the District of Colorado. Both the claimants and the government moved for summary judgment. The district court found for the claimants.[27] The court based its decision on findings that the pre-1920 locations were valuable mineral deposits, that Congress had approved the *Freeman* rule, and, alternatively, that Interior was estopped from denying the

19. 100 S. Ct. at 1935.

20. Decision of Dalby, J. (Apr. 17, 1970). The decision of Judge Dalby was not reported. A copy of the full decision may be found in Appendix F, Petition for Certiorari at 166a-67a, Andrus v. Shell Oil Co., 100 S. Ct. 1932 (1980).

21. 390 U.S. 599 (1968).

22. *Id.* at 602.

23. *See* note 20 *supra* at 166a-67a.

24. United States v. Winegar, 81 Interior Dec. 370 (1974).

25. *Id.* at 396-99.

26. *Id.* at 399.

27. Shell Oil Co. v. Kleppe, 426 F. Supp. 894 (D. Colo. 1977).

validity of the claims.[28]

The Tenth Circuit Court of Appeals, per Chief Judge Seth, affirmed the district court in *Shell Oil Co. v. Andrus*.[29] The court of appeals reasoned that the *Freeman* standard had become an annexation to the mining law of 1872 to such an extent that it could not be removed without affirmative congressional action. The Tenth Circuit asserted that the intensive congressional investigations into the test without any subsequent modification of the *Freeman* standard constituted a congressional ratification of the future marketability test for oil shale.[30] Chief Judge Seth noted that Congress was fully aware of the *Freeman* standard in 1930 when it conducted investigations into the possibility that the original oil shale locations were fraudulent. Since Congress, at the conclusion of these investigations, did not call for the imposition of the prudent man standard to satisfy oil shale discovery requirements, the Tenth Circuit found that Congress had affirmatively approved the future marketability standard of *Freeman*.[31] The Tenth Circuit emphasized Interior's "contemporaneous construction" of the oil shale marketability standard in both the *Freeman* decision and the 1920 Secretarial instructions regarding oil shale claims.[32] The court of appeals was convinced that these departmental interpretations, coupled with apparent congressional approval of these interpretations, were sufficient to demonstrate the creation of an oil shale exception to the *Castle v. Womble* prudent man standard.[33]

II. CONGRESSIONAL RATIFICATION AND CONTEMPORANEOUS CONSTRUCTION

In a six to three decision, the Supreme Court affirmed the holding of the Tenth Circuit.[34] Chief Justice Burger, for the majority, dealt extensively with the legislative history of the 1920 Mineral Leasing Act and with the subsequent actions taken by Congress in considering the *Freeman* decision. The majority asserted that the 1920 Act was passed as an effort to put an end to the question of oil shale patentability. The Court concluded that the marketability requirement of the General Mining Law was met by the pre-1920 oil shale claims.[35] The Court relied, as had the Tenth Circuit, upon the contemporaneous construction of the *Freeman* decision, the 1920 Secretarial instructions and the subsequent patenting by Interior officials of many pre-1920 oil shale claims.[36]

The Supreme Court also adopted the reasoning of the Tenth Circuit concerning the 1930 congressional hearings on the issue of the patentability of the pre-1920 oil shale locations. Since the Senate committee conducting

28. *Id.*
29. 591 F.2d 597 (10th Cir. 1979). *See* note 2 *supra*.
30. *Id.* at 602.
31. *Id.* at 604.
32. *Id.* at 603-04. *See* notes 15, 18 *supra*.
33. *Id.* at 605.
34. Andrus v. Shell Oil Co., 100 S. Ct. 1932 (1980).
35. 100 S. Ct. at 1937-38.
36. *Id.* at 1936-37.

the investigations did not issue a report, and the House of Representatives, after its hearings, did not reject the future marketability standard of *Freeman*, the Court held that Congress had specifically affirmed the future marketability test for oil shale locations.[37]

Chief Justice Burger stated that for the Court to find oil shale "non-valuable" would be unlawful judicial invalidation of congressional intent to apply a future marketability standard for oil shale locations as demonstrated by the 1930 hearings and by the 1956 congressional modification of the 1920 Mineral Leasing Act.[38] The Court also noted the irony of Interior's attempts to have the oil shale claims adjudged non-valuable at a time when all alternative energy sources were becoming extremely valuable because of the United States energy crisis. Though not directly addressing the estoppel issue, the Court noted that Interior had consistently applied the *Freeman* rule for thirty-three years.[39]

In his dissent, Justice Stewart declared that he was unable to find anything in the legislative history of the Mineral Leasing Act which would permit creation of a less stringent test for oil shale locations.[40] He noted that although the congressional hearings of 1930 focused on the *Freeman* decision, the *Freeman* standard was never expressly approved. The Justice further asserted that, even if congressional approval for the *Freeman* decision were found, it would not be sufficient to overrule the plain meaning of the saving clause of the 1920 Act.[41] The dissent also pointed out that the 1956 congressional amendment to the Mineral Leasing Act had nothing to do with the question of valuable mineral deposits as that term related to oil shale claims. Justice Stewart found that the Mountain Boy and Shoup claims necessarily failed the valuable mineral deposit test.[42]

III. Analysis of the Court's Rationale

Chief Justice Burger stated that the 1920 Mineral Leasing Act was enacted in order to put an end to the question of patentability of oil shale. He did not totally rely on the 1920 Act, however, as he also emphasized subsequent legislative actions and Interior decisions.[43] To have stated that the 1920 Act settled patentability questions would have been incorrect. One commentator has noted that the Mineral Leasing Act of 1920 was the result of a controversy between the Interior Department and private parties over the ownership of natural resources.[44] It also has been stated that "Congress

37. *Id.* at 1940 n.10 (citing H.R. REP. No. 2537, 71st Cong., 3d Sess. (1931)).
38. *Id.* at 1941.
39. *Id.*
40. *Id.* at 1942-43 (Stewart, J., dissenting).
41. *Id.* at 1943. The dissent recognized that neither the Board of Land Appeals nor the Tenth Circuit Court of Appeals held that there was no evidence that claimants had met the prudent man test of value. Justice Stewart noted, however, that the hearing examiner had specifically stated that the Mountain Boy and Shoup claims failed the 1920 test for value. Indeed, none of the numerous adjudicatory panels found that the *Castle* test, as supplemented by *Coleman*, had been met by the respondent.
42. *Id.* at 1944.
43. *Id.* at 1937-38.
44. *Foreword* to H. SAVAGE, THE ROCK THAT BURNS at v (1967).

was well aware that oil shale was an undeveloped natural resource; [and] that there was no precedent nor handbook to supply the answers to many complex problems."[45] With so many unresolved issues before Congress at that time, it is difficult to see how the Court could conclude that the 1920 Act resolved all oil shale patentability questions. The suit between Shell Oil and Interior demonstrates that for several decades questions concerning oil shale patentability have not been answered.

A. *The* Freeman *Decision*

The Court relied, as had the lower courts, on the future marketability test established in *Freeman*. The District Court for the District of Colorado found, for example, that the *Freeman* decision was not an undue extension of the test of the prudent man as established by *Castle v. Womble*, since the prudent man would consider the future marketability of the fruits of his labor in deciding whether to continue his project.[46] The decision in *Castle v. Womble*, however, contains language that negates such a conclusion. In *Castle v. Womble*, Secretary Smith stated that a claimant's hopes and beliefs would not be useful in determining the value of mineral deposits and that the requirement of value related only to the present available facts, "not to the probabilities of the future."[47]

It is significant that the only precedent cited in *Freeman* in support of the future marketability standard was *Narver v. Eastman*,[48] a case wherein the Board had held that a valid discovery does not require disposal of the mineral at a profit. The Board in *Narver* had compared a mineral locator to a farmer who has a bad year and yet sells his crops in order to recoup some of the loss. While the farmer receives no profits from his labor, it could not be argued that his crops were without value.[49] The *Freeman* decision's reliance on such an analogy, however, was unsound. If a prudent farmer had known *before* planting his crops that he would not realize a profit, then he would not have planted at all.[50] Based on the economic information available to the oil shale claimants throughout the history of the claims, no claimant could have considered oil shale development economically viable. Thus, the oil shale claimants are in the position of the hypothetical farmer who knows, prior to planting, that his crops will not produce a profit.

The Court also relied on subsequent congressional approval of the *Freeman* test.[51] It is doubtful, however, that the hearings on which the majority relied constituted a ratification of the *Freeman* decision. Congress clearly was aware of the *Freeman* decision, since it had been the focus of several congressional hearings. But it is debatable whether awareness equals approval. The district court felt that the failure of Congress to change the discovery requirements under *Freeman* demonstrated congressional adoption of the *Free-*

45. *Id.*
46. Shell Oil Co. v. Kleppe, 426 F. Supp. 894, 896 (D. Colo. 1977).
47. 19 Pub. Lands Dec. at 457.
48. 34 Pub. Lands Dec. 123 (1905).
49. *Id.* at 125.
50. United States v. Winegar, 16 I.B.L.A. 112, 170 (1974).
51. 100 S. Ct. at 1939-40.

man standard.[52] The Tenth Circuit adopted the district court's conclusion, finding that congressional inaction, in the face of the many alternatives which it could have taken to overrule *Freeman*, manifested a congressional intent to follow the *Freeman* test.[53]

It is significant that neither of the lower federal courts cited case law or statutory provisions for the proposition that non-action equals ratification. Such a conclusion is clearly at odds with the Court's position in the cases of *TVA v. Hill*[54] and *SEC v. Sloan*,[55] wherein the Court held that congressional intent to repeal a recognized standard must be clear and express. In fact, the only action taken by Congress after the *Freeman* investigations was the dispatch of a letter, from the chairman of one of the investigatory committees to the Secretary, instructing him to "proceed to final disposition of pending applications . . . in conformity with the law."[56] To endorse the concept that statutory law may be amended by the inaction of the legislative body establishes a potentially dangerous precedent, especially when the inaction is, in turn, based on an arguably erroneous administrative interpretation of the statutes.

B. *Determination of "Valuable Mineral Deposits"*

The Supreme Court stated that the question presented in *Andrus v. Shell Oil Co.* was whether "oil shale deposits located prior to the 1920 Act are 'valuable mineral deposits' patentable under the savings clause of the Act."[57] By deciding, on the basis of *Freeman*, that these oil shale deposits had future value and were therefore valuable mineral deposits, the Court precluded Interior from applying the present marketability standard established in *Castle v. Womble*. Yet, the *Castle v. Womble* test was the only interpretation of the term "valuable mineral deposit" available when the original Shoup and Mountain Boy claims were located in 1917 and 1918 and when the Mineral Leasing Act was passed in 1920. Thus, with respect to the original location of these claims, the only test which could be applied was that of *Castle v. Womble*. The purported change in this standard effected by *Freeman* occurred *seven years after* the enactment of the Mineral Leasing Act. The Supreme Court held, however, that these pre-1920 claims need only meet the 1927 standard established in *Freeman*. The Supreme Court's retroactive use of the *Freeman* test to change a standard in effect at the time of the Leasing Act's passage is questionable.

Davis v. Wiebold, a Supreme Court case decided prior to the location of the Mountain Boy and Shoup claims and prior to the *Freeman* decision, had held that the burden was on the mineral claimant to show that his claim was, as a present fact, mineral in character and capable of actual production.[58] *Wiebold* also conditioned patentability on the existence of a mineral

52. 426 F. Supp. at 901.
53. 591 F.2d at 601.
54. 437 U.S. 153, 189 (1978). *See also* Cleveland v. United States, 329 U.S. 14 (1946).
55. 436 U.S. 103, 119-21 (1978).
56. Petitioner's Brief for Certiorari at 18, Andrus v. Shell Oil Co., 100 S. Ct. 1932 (1980).
57. 100 S. Ct. at 1934.
58. Davis v. Wiebold, 139 U.S. 507, 523 (1891).

deposit that could be extracted at a profit through present expenditures and effort rather than through some future, speculative value.[59] The *Wiebold* decision supports the *Castle v. Womble* and *Coleman* tests rather than the test enunciated in *Freeman*.

For the Court to ignore the prudent man standard for value established by administrative ruling and Supreme Court precedent in effect when the Leasing Act was passed, and for the Court to disregard the fact that no legislative amendment to the prudent man standard was added at that time, contradicts both applicable law and the intent of the legislative body. The inherent weakness in determining legislative intent by examining subsequent administrative decisions and subsequent congressional hearings, rather than by looking to the fact that there was a pre-existing standard not changed by the statute, is evident. Though Chief Justice Burger recognized, in a footnote, that the Court had approved an extension of the *Castle v. Womble* test in the *Coleman* decision by requiring the mineral to be "extracted, removed, and marketed at a profit," the Chief Justice stated that this new standard did not apply to the oil shale claims.[60] Even if a prudent man would have chosen to expend money and labor in developing oil shale claims, there is no evidence that the actual production of oil shale was then, or at any time since, marketable. It is clear that, had the Court followed its decision in *Coleman*, the result would have been an invalidation of the oil shale claims because of failure to meet the present marketability test.

Evidence of the lack of marketability of oil shale to date is abundant. As noted by the Board, a half-century has failed to show a single commercial operation on any of the patented or unpatented oil shale claims. Forty years of intermittent efforts have failed to produce even the beginnings of an industry which could process oil shale economically. Based on the definitions of value as adopted by the Supreme Court both in the early part of this century in *Castle v. Womble*, and as late as 1968 in *Coleman*, the Court's decision to adopt *Freeman* as the absolute test for oil shale marketability indicates that the present Court was predisposed to find the oil shale claims valuable.

C. *The Estoppel Argument*

Although the Court did not specifically address the estoppel issue, the Court's use of the contemporaneous construction argument seems to be very much like estoppel. By looking at the history and administrative developments subsequent to the passage of the Leasing Act, and by holding that Interior should not be permitted to invalidate pre-1920 claims because of the reliance of the claimants on subsequent Interior interpretations and actions, the Court seemed to be making an equitable estoppel argument. This case was not the first in which the Court applied principles of equitable estoppel against the government with regard to oil shale. Interior has been estopped on several previous occasions from denying the validity of oil shale patents on the basis of the assessment requirements of the mining laws.[61]

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59. *Id.* at 525.
60. 100 S. Ct. at 1935 n.4 (citing United States v. Coleman, 390 U.S. at 602).
61. *See* note 5 *supra*.

In recent years the emphasis on equitable estoppel has been to achieve fairness between the parties, and the traditional restrictions on the assertion of the doctrine against the government have had only limited effect.[62] Even current decisions, however, are quick to subordinate the interest of the individual, who has a valid estoppel argument, to the interests of the public, as represented by the government, when the facts indicate that estoppel would cause much greater harm to the public than to the individual. One of the earliest cases holding that estoppel would not apply against the government was *United States v. Lazy FC Ranch*.[63] The Ninth Circuit, in this case, held that, although estoppel would normally apply in the situation, it would be allowed only where the public interest would not be unduly harmed and where public policy would not be significantly frustrated.[64] The public interests sacrificed by the Supreme Court's decision in *Andrus v. Shell Oil Co.* include the large mineral windfall to the respondent, which will now not have to bid for lease agreements. This represents a substantial loss of funds which would otherwise go into the public fisc. It appears that this consideration would have been sufficient to justify the Court's denial of the oil shale patent applications.

IV. Policy Considerations

The general policy behind the mining laws was enunciated in *Cataract Gold Mining Co.*,[65] in which the Board referred to the early history of the United States efforts to develop a consistent policy to promote and encourage the discovery and development of minerals. The Supreme Court alluded to this position in commenting on the need for a sharp increase in alternative energy sources and by noting the ironic position of Interior in challenging the validity of claims which could promote production of an alternate energy source.[66]

What is unclear, however, is how a different outcome would jeopardize the production of these oil shale reserves. The district court declared that it wanted to avoid tying up oil shale claims in years of litigation.[67] But a decision invalidating the claims would have terminated the litigation as quickly as a ruling in favor of patentability. Also, in its decision giving Shell Oil a potential monopoly on these particular claims, the Court removed the possibility of competitive bidding for leases, thereby reducing the competitive incentive for producers to explore and develop the oil shale resources in the most efficient manner. The Court has, in effect, restricted the market forces of supply and demand by creating a partial monopoly for Shell Oil Company.

While the invalidation of the oil shale claims would have resulted in a financial loss to respondents, this loss could be justified in light of the grave

62. *See* Comment, *Emergence of an Equitable Doctrine of Estoppel Against the Government—The Oil Shale Cases*, 46 U. COLO. L. REV. 433, 446 (1975).
63. 481 F.2d 985 (9th Cir. 1973).
64. *Id.* at 989.
65. 43 Pub. Lands Dec. 248 (1914).
66. Andrus v. Shell Oil Co., 100 S. Ct. at 1941.
67. Shell Oil Co. v. Kleppe, 426 F. Supp. at 907.

harm incident to a perpetuation of the *Freeman* interpretation of the General Mining Law. A continuation of the erroneous *Freeman* administrative ruling serves neither the mining laws nor the public. The practical effect of the *Andrus v. Shell Oil Co.* decision has been to open the way for the patenting of more than five million acres of federal land for $2.50 an acre. Clearly, the resulting monetary loss to the government, which would have been able to lease the oil shale lands on a competitive basis, is tremendous.

By allowing public lands to go to respondents outside of the leasing system, the objectives of the oil shale leasing regulations and the policies behind them have been circumvented. The leasing regulations are designed to

> foster improved technology for mining and recovery of shale oil and other mineral components of oil shale, to encourage competition in the development and use of oil shale and related mineral resources and [to] develop a basis for future competitive leasing of federal oil shale lands, to encourage participation by companies which are not favorably situated with respect to access to reserves of the minerals which are present in oil shale, to prevent speculation and windfall profits, and to provide reasonable revenues to the Federal and state governments—all under mining operation and production practices that are consistent with good conservation management of the overall resources in the oil shale regions.[68]

These policy considerations cannot be treated lightly. They go to the very heart of our mineral leasing system and should have been considered by the Court. The Court has taken on a mask of equity and justice, yet it has avoided very important environmental and developmental considerations.

The decision in *Andrus v. Shell Oil Co.* is an example of the Court's ability to rationalize a result which it deems favorable, regardless of applicable legal precedent and congressional intent. The result has been a potentially massive windfall for a few oil companies and a substantial loss to the people of the United States.

William G. Myers, III

68. Anderson, *Acquiring Rights to Minerals Associated With or Contained In Oil Shale*, 13 ROCKY MTN. MIN. L. INST. 233, 243 (1967).