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The Disputed Oil Shale Claims:
Background and Current Conflict

Interest in oil shale¹ as a source of energy has revived in the United States during the past decade,² due largely to technological advances enabling oil from shale to compete profitably with petroleum from drilled wells.³ About seventy-five per cent of the valuable oil shale lands are clearly under federal ownership.⁴

1. Oil shale is not technically shale, nor is its organic content oil. The rock is a marlstone; the organic matter is a rubbery solid called kerogen. Chemically, the primary difference between kerogen and crude petroleum is geometric. By heating the kerogen to between 500 and 900 degrees Fahrenheit, the molecular structure yields an oil equivalent which is about 66% of the kerogen's weight, plus a fuel gas and a coke-like solid. The oil is viscous and high in sulfur and nitrogen content; however, it can be refined into products similar to those derived from crude petroleum. ³ de Nevers, *Tar Sands and Oil Shales*, Scientific American, Feb. 1966, pp. 21, 24; Kelly, *Oil Shale: 1964 or 1984*, *Western Resources Conference* 237, 240 (1964); see generally *Hearings Before the Senate Comm. on Interior and Insular Affairs on Oil Shale*, 89th Cong., 1st Sess. 24 (1965) [hereinafter cited as 1965 Hearings].


3. Kelly, supra note 1; Steele, *The Role of Economic Research in Appraising the Future of Shale Oil*, *Western Resources Conference* 261 (1964). Technology may have provided the answer in the "nick of time" since some experts predict that oil shale will be needed to supply a portion of North America's petroleum requirements by 1975. Oil & Gas J., Nov. 1, 1966, p. 42.

Commercial recovery of the oil shale should begin this year, and reach significant market proportions by 1970. de Nevers, supra note 1, at 27, 29. There are two basic methods of recovery: mining and then processing the shale; or heating it in place and then recovering the oil through drilled wells. Thus far, most efforts have been limited to the first method. de Nevers, supra note 1, at 24. Since the cost of mining the shale, crushing it, and transporting it to the processing plant is three or four times the cost of the retorting, a feasible in situ recovery method would result in a considerable economy. de Nevers, supra note 1, at 25; Steele, supra at 263; see generally U.S. Bureau of Mines, *Bull. 611, Oil-Shale Mining*, Rifle, Col., 1944-56, at 4 (1964). The in situ retorting could be accomplished through underground combustion by means of conventionally drilled wells, or underground nuclear explosions. For discussions of these two processes see de Nevers, supra note 1, at 27; Lekas & Carpenter, *Fracturing Oil Shale with Nuclear Explosives for In-Situ Retorting*, Colo. S. of Mines Q., July 1965, p. 7.


Twenty-nine states have oil shale, although only the Green River Formation deposits in Colorado, Utah, and Wyoming have potential commercial significance, containing over one trillion barrels of petroleum-like material. According to conservative estimates, 50 billion barrels could presently be recovered at prices competitive with crude
with the remainder divided between private owners and mining claimants whose attempts to perfect their claims are currently being contested by the government. The conflict between the mining claimants and the federal government is the principal subject of this Note. To thoroughly understand the current conflict, however, it is necessary to examine the origin of the disputed mining claims.

I. ORIGIN OF THE DISPUTED CLAIMS

Prior to 1866, prospectors searched for minerals on the public domain with little or no interference from government officials. In an effort to bring order to these activities, Congress passed a general mining law that basically adopted the customs and rules of ownership established by the prospectors in the Gold Rush of 1849. Oil shale claims, which are based upon placer locations, petroleum. National Fuels and Energy Study Group, An Assessment of Available Information on Energy in the United States, S. Doc. No. 159, 87th Cong., 2d Sess. 64 (1962). A more realistic appraisal, however, would put the recoverable United States oil shale reserves in the neighborhood of 500 billion barrels. Id. at 70-71; see also Childs, supra at 1; Statement of Under Secretary of the Interior John A. Carver, Jr., 1965 Hearings 24; Jackson, Legal, Political, and Administrative Problems in Oil Shale, WESTERN RESOURCES CONFERENCE 287 (1964); Oil & Gas J., Jan. 17, 1966, p. 41. The value of the Green River deposit is approximately seven times the national debt. Statement of Senator Allott of Colorado, 1965 Hearings 8.

5. The disputed mining claims cover 338,000 acres of land in the Piceance Creek Basin alone. This land contains about 100 billion barrels. Another 380,000 acres containing over 100 billion barrels are already in private hands. The federal domain, which contains the thickest and richest deposits, covers about 582,000 acres and is estimated to contain 1.1 trillion barrels of oil. 1965 Hearings 27.

6. See generally Hochmuth, Government Administration and Attitudes in Contest and Patent Proceedings, 10 ROCKY MT. MINERAL L. INSTITUTE 467 (1965); Pearl, Projected Impact of Pending Proposals to Revise the Mining Laws, 9 ROCKY MT. MINERAL L. INSTITUTE 1, 6 (1964).

7. Article IV of the United States Constitution places the power to dispose of the public lands exclusively in the Congress: "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . " By general statutory provisions, the Department of the Interior has the authority to administer the laws regulating public lands and to conduct the general care of these lands. See, e.g., 5 U.S.C. §§ 481, 485; 43 U.S.C. §§ 1, 2, 1201 (1964); Cameron v. United States, 252 U.S. 450, 459 (1920).


10. Petroleum was declared a mineral subject to discovery and location under the general mining laws by the Petroleum Placer Act, 29 Stat. 526 (1897), 30 U.S.C. § 101 (1964). It was generally believed
stem from a later act\textsuperscript{11} bringing nonlode claims under the mining laws. To encourage exploitation of the minerals in the public domain,\textsuperscript{12} the requirements for establishing and patenting a mining claim were both easy and attractive. To establish a claim the miner had to discover a valuable mineral\textsuperscript{13} and locate his claim. Location was accomplished by marking the ground, posting notice of the claim, or recording it in a local recording office, depending upon the requirements of applicable state law.\textsuperscript{14}

Once the mining claim was established by a valid discovery and proper location, the mining claimant obtained an equitable and possessory interest in the land and its minerals.\textsuperscript{15} This interest was "real property in the highest sense,"\textsuperscript{16} although legal title to the land remained in the United States.\textsuperscript{17} To become the fee simple owner of the claim, the miner applied for a

that this act embraced oil shale as well as other types of petroleum deposits. Reidy, supra note 9, at 12. In 1920 the Secretary of the Interior [hereinafter referred to as the Secretary] issued instructions confirming this belief. 47 Interior Dec. 548 (1920).


12. The policy of the 1872 Act is described in its preamble:

Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase . . . .


13. Discovery occurs 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 . . . .
Castle v. Womble, 19 Interior Dec. 455, 457 (1894).

Discovery is not necessarily the first step, but there can be no valid claim until a discovery of a valuable mineral has been made. Cole v. Ralph, 252 U.S. 286, 296 (1920). See generally Mock, Marketability as a Test of Discovery Under the Federal Mining Laws, 7 Rocky Mt. Mineral L. Institute 263 (1962).


DISPUTED OIL SHALE CLAIMS

For five dollars per acre, the applicant could, absent an adverse claimant, obtain the patent by showing a valid discovery, proper location, and the expenditure of five hundred dollars or more in labor or improvements on the claim.

It was not essential to apply for the patent; the miner could retain his less than fee simple interest in the mining claim by maintaining it in accordance with the mining laws. The basic federal maintenance requirement was the performance of assessment work consisting of the annual expenditure of at least one hundred dollars in labor or materials to develop the claim; failure to do the assessment work in any one year subjected the claim to relocation by another miner. If validly relocated, the original claim was extinguished. The only other way a miner could lose his claim was to abandon it.

II. THE GOVERNMENT'S ATTACK ON THE OIL SHALE CLAIMS

A decline in the discovery of new crude petroleum deposits and an increase in the demand for oil caused by World War I

20. Ibid.
22. Ibid.
23. Ibid. The relocation must occur before the original claimant resumes his assessment work. Thus, if a mining claimant failed to perform his annual labor for one year, he would not ipso facto forfeit his claim. Unless another miner entered the claim and met all the federal and local statutory requirements for a valid relocation, the original claimant could resume his assessment work in the following year with no adverse consequences. See Belk v. Meagher, supra note 21; Nielson v. Champagne Mining & Milling Co., 29 Interior Dec. 491 (1900).
24. See Union Oil Co. v. Smith, 249 U.S. 337, 349 (1919). Thus far, abandonment of mining claims has been determined by the historic test of intent to abandon. See, e.g., South Dakota v. Madill, 53 Interior Dec. 195, 199 (1930), aff'd on rehearing, 53 Interior Dec. 203 (1931); Reidy, supra note 9, at 11. Mere failure to do the annual assessment work is not considered conclusive evidence of intent to abandon the claim. See, e.g., Talache Mines v. United States, 218 F.2d 491, 495 (9th Cir. 1954) (determination of no abandonment for income tax purposes); Wiltsee v. Utley, 79 Cal. App. 2d 76, 179 P.2d 13 (1947).

created an oil shale boom during the 1916-1920 period. Approximately 30,000 oil shale placer mining claims were located under the mining laws during this period. Only a few of these claims were immediately taken to patent; the rest for the most part were unworked and apparently forgotten or abandoned as interest in oil shale declined after the war.

A major factor contributing to the lessened interest in oil shale was the Mineral Leasing Act of 1920 which provided that oil shale was no longer a locatable mineral under the mining laws. However, section 37 of the act contained a savings clause which provided that valid mining claims existent on the date of the act "and thereafter maintained in compliance with the laws under which initiated" could be patented under those laws. In the 1920's the Department of Interior prepared to test the scope of this clause with an exhaustive investigation of all oil shale claims. Contests were filed against those claims which were deemed invalid for lack of discovery, abandonment, and failure to perform annual assessment work. The latter charge was based upon the theory that assessment work was necessary not only to preserve a claim against other mining claimants, but also to protect it from forfeiture to the government.

25. See Jackson, Legal, Political, and Administrative Problems in Oil Shale, Western Resources Conference 287 (1964).
27. Ibid. The first patent application on an oil shale claim was apparently made in 1920. See Instructions, 47 Interior Dec. 548 (1920); see also Jackson, supra note 25, at 289; Oil Shale Symposium, 43 Denver L.J. 1, 2-3 (1966).
28. The decline in interest in oil shale was caused by several factors. Some thought the Mineral Leasing Act, 41 Stat. 437 (1920), 30 U.S.C. §§ 181-263 (1964), destroyed their claims; the demand for oil decreased with the end of World War I; new fields of crude petroleum were discovered; and no economically competitive method for recovering oil shale had been devised. See materials cited notes 26-27 supra.
32. Only the claims subject to assessment work attacks are now being contested in the courts, involving one hundred billion barrels of oil shale. 1965 Hearings 27.
33. The same theory was used by the Interior in E.C. Kinney, 44 Interior Dec. 580 (1916), to deny a claim of damages caused by the flooding of mining claims taken by the Secretary of the Interior under the authority of a reclamation act. Failure to perform the annual assessment work after the lands subject to the mining claims had been withdrawn was held to constitute a forfeiture of the mining claims. The rule stated in this case was originally promulgated in Instructions, 32 Interior Dec. 387 (1904). The Secretary stated that a mining claim on
A. The Krushnic Decision

In *Emil L. Krushnic*, the Secretary charged that the claimant had failed to do his assessment work for the year 1920, even though such work had been resumed thereafter. The claimant emphasized that the mining laws provided only two penalties for failure to do the assessment work: the risk of losing the claim by relocation, and the forfeiture by a noncontributing co-owner of his interest in the claim. He argued that since by statute only the rights of private parties, not those of the United States, were affected by the failure to do the assessment work, jurisdiction over controversies in this regard rested solely in the courts, particularly since the Interior Department and the courts had in the past declared that questions of annual assessment work were outside the Interior's jurisdiction. The claimant further argued that the Government should have at least challenged the validity of his claim while the assessment work was in default since only at that time could the claim have been relocated by an adverse party.

In answer to the jurisdictional argument, the Secretary concluded that since Congress intended the performance of annual assessment work to be a "maintenance" requirement under section 37, it was incumbent upon the Interior to decide this matter to protect the rights of the United States. The Secretary summarily rejected the claimant's second argument by stating that it would be untenable to require the Government to act the part of an adverse claimant. Under this decision, default in assessment work automatically forfeited the claim.

While the Interior was challenging other claims on the basis of failure to perform the annual assessment work, *Krushnic* reached the Supreme Court and was reversed in an unanimous decision. The Court stated that a default in assessment work land withdrawn pursuant to the reclamation act could be divested by failure to comply with the law, and "the land department has the jurisdiction to determine that question and to declare by its judgment whether such right has been divested. . ." This asserted authority as exercised in the *Kinney* case was apparently never tested in the courts.

34. 52 Interior Dec. 282 (1927), on rehearing, 52 Interior Dec. 295 (1928). This was the first assessment work contest to come to the Secretary. Brief for Plaintiff, p. 18, Oil Shale Corp. v. Udall, 261 F. Supp. 954 (D. Colo. 1966) [hereinafter cited as Plaintiff's Trial Brief].

35. The Secretary also alleged fraudulent location and lack of discovery, but these charges were dismissed on demurrer for insufficient evidence. 52 Interior Dec. at 284.

36. This "untenable" position was taken by the Interior after *Krushnic* was reversed. See notes 40-41 infra and accompanying text.

did not ipso facto forfeit the claim but only subjected it to loss by relocation. If work was resumed before a valid relocation, the mining claim was “preserved,” not “restored.” Thus, the resumption of assessment work was the import of “maintained” within section 37. Since oil shale lands could no longer be located or relocated because of the act, an unworked claim remained valid “unless at least some form of challenge on behalf of the United States intervened.”

B. The Virginia-Colorado Decision

After the Supreme Court’s reversal, the Secretary interpreted Krushnic to mean that mining claims still could be contested for failure to do annual assessment work if the challenge were instituted while the work was in default. Consequently, the Interior began posting notices of forfeiture of all oil shale claims which were currently in default on assessment work. In effect the government assumed the role of an adverse claimant, although it performed no assessment work on the claims.

In 1935, the Supreme Court struck down this type of forfeiture proceeding in Ikes v. Virginia-Colorado Dev. Corp. The Court stated that the mining claimant “had lost no rights by failure to do the annual assessment work;” and, therefore, the Interior Department had acted “beyond the authority conferred by law.” Consequently, the Interior overruled all departmental decisions in conflict with the Virginia-Colorado case, and thereafter abandoned its policy of challenging oil shale claims for failure to do annual assessment work. During the next thirty years, 106 patents were issued on oil shale claims. Seventy-one of these patents covered one or more claims that had been declared void.
for nonperformance of assessment work in the 1920-1930 contest proceedings. Then, in 1964, the Interior reversed its position and asserted that the earlier proceedings were a bar to patent applications.

III. THE CURRENT CONTROVERSY: TOSCO V. UDALL

In 1964, applications for patents were made on 257 oil shale claims which had been declared null and void by the Interior between 1930-1933 for default in annual assessment work. These applications were rejected on the basis that the principles of finality of administrative action, estoppel by adjudication, and res judicata now barred assertion of the claims although the earlier cancellations were incorrect as a matter of law.

In 1966, four cases were consolidated in the Federal District Court of Colorado to prevent the assertion of the earlier contest proceedings against oil shale claims. Three of the actions were for mandatory orders compelling the Interior to issue patents on the oil shale claims; the other was for a declaratory judgment regarding the rights of the claimants to patents. The oil shale claims in these cases had been subjected to contest proceedings, both before and after the Supreme Court decision in Krushnic, for failure to do the annual assessment work.

Three separate grounds for relief were asserted by the claimants. The first was that the 1928-1933 contest proceedings against the claims were void for lack of jurisdiction, a position based upon argument asserted by the claimant in the Krushnic case and upon an interpretation of the Supreme Court decision in the Virginia-Colorado case. The second ground asserted was that the Interior in the Shale Oil decision in 1935 had adopted a rule that the prior contest proceedings were void and without force or effect, and that this rule could not be retroactively reversed.

47. Plaintiff's Trial Brief, pp. 36-37.
49. Oil Shale Corp. v. Udall, 261 F. Supp. 954 (D. Colo. 1966) [hereinafter cited as Tosco].
50. See notes 34-36 supra and accompanying text.
51. Most of the claims in Tosco were subjected to challenges similar to those in Krushnic. Apparently, the Interior considered these contests voided by Standard Shales Prods. Co., 53 Interior Dec. 42, 44-45 (1930), which overruled all department decisions in conflict with Krushnic, since it began new contests against the claims. Compare this procedure with the position taken by the Interior in Union Oil Co., 71 Interior Dec. 169 (1964). In that case, the Interior maintained that the case of Shale Oil Co., 55 Interior Dec. 287 (1935), which performed a similar housekeeping function after the decision in Ikes v. Virginia-
The final ground asserted for relief was that even if the 1928-1933 decisions were regarded as merely erroneous the claimants could now seek direct review and obtain their reversal. The district court based its decision solely upon the first ground, relying upon the basic principle that a decision by a tribunal outside its subject matter jurisdiction is of no effect whatsoever.

Whether the Interior in fact had acted outside its subject matter jurisdiction in the earlier contest proceedings had to be determined, in the court's view, by examining the Krushnic and Virginia-Colorado opinions. The only penalty for failure to do annual assessment work was the possible loss of the claim to another miner, a matter for the courts, since the issue was outside the Interior's jurisdiction. The Krushnic and Virginia-Colorado cases reaffirmed this principle, even though the word "jurisdiction" does not appear in the decisions. According to the Virginia-Colorado decision, the grounds available to the Interior to challenge the validity of a mining claim are lack of discovery, fraud, "other defect," or abandonment. Since failure to do assessment work was not a basis for challenging the validity of a claim, the Virginia-Colorado Court concluded that the Interior's challenge went beyond the authority conferred by law. The court in Tosco, following these cases, decided that the Interior had no jurisdiction to declare mining claims void for failure to perform annual assessment work. The earlier contest proceedings were therefore void and provided no basis for denial of patent applications.

Colorado Dev. Corp., 295 U.S. 639 (1935), with almost the same language, did not void the contest proceedings instituted after the Krushnic decision. 71 Interior Dec. at 175.

52. The plaintiffs had requested the court to decide all three issues in order to avoid further unnecessary trials if the court were reversed on one of the grounds. Post-Trial Brief for Plaintiffs, pp. 5-6, Oil Shale Corp. v. Udall, 261 F. Supp. 954 (D. Colo. 1966).

53. See notes 21, 23 supra and accompanying text.


55. 280 U.S. at 317.

56. 295 U.S. at 645.

57. Ibid.

58. "Plaintiff had lost no rights by failure to do the annual assessment work; that failure gave the government no ground of forfeiture." Id. at 646.

59. Id. at 647.
Because of its immense economic impact, the Tosco decision undoubtedly will be appealed. Therefore, a more extended discussion of the jurisdiction issue, and arguments raised by the parties but ignored in the opinion, is appropriate. Even assuming that the earlier contest proceedings lacked jurisdiction, the Interior argued that they were res judicata. For support of this proposition the government relied primarily upon two Supreme Court cases, Chicot County Drainage Dist. v. Baxter State Bank60 and Butte, A. & R.R. v. United States.61 In Chicot, the plaintiff was barred from recovering on bonds of the defendant by a prior decree of a district court effecting a readjustment plan for the defendant's indebtedness. After the prior decree had been entered, the statute empowering the district court to so act was declared unconstitutional. The Supreme Court rejected the plaintiff's argument that the decree had been rendered void when the statute under which it was issued was declared unconstitutional. Instead the Court held that the decree was res judicata and immune from collateral attack. In Butte, the ICC, pursuant to its statutory authority, ordered payments to certain railroads to cover losses incurred while under government control during the war. Two years later the ICC redefined the statutory term "deficit," and the government attempted to recover the amounts paid which would not have been allowed under this reinterpretation. The Court held the first order to be res judicata.

These two cases, while holding that an incorrect decision may be res judicata, can be distinguished from Tosco. In the Chicot case important economic interests were created in reliance upon the validity of the first decree.62 No such economic interests are present in Tosco. If there was any reliance upon the earlier contest proceedings, it was by the mining claimants upon the invalidity of those proceedings. The Government clearly had not relied upon their validity. This factor is even more important since the Court in Chicot specifically restricted itself to the situation it faced.63 Also, the Chicot case was indirectly limited in Kalb v. Feuerstein,64 where the Court indicated that strong public policy considerations might defeat strict application of res judicata.

The Butte case is more analogous to the Tosco situation ex-

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60. 308 U.S. 371 (1940).
61. 290 U.S. 127 (1933).
63. 308 U.S. at 375.
64. 308 U.S. 433 (1940).
cept that, like Chicot, important economic interests were created in reliance upon the incorrect agency decision. Also, a specific duty to take affirmative action had been imposed upon the agency by the statute. According to the Court this imposition necessarily entailed a duty to interpret the statute. Since Congress had not provided a method of review, it must have intended that the administrative action should bind the Government and the private parties regardless of whether the error was one of fact or law.65

The affirmative duty to act was also a deciding factor in West v. Standard Oil Co.,66 relied upon by the plaintiffs in Tosco. Interior Secretary Fall had dismissed proceedings to determine the mineral character of land allocated to California under a grant of lands known to be nonmineral in character on the date of the act. Four years later Secretary Work sought to reopen the proceedings. The Court found that the dismissal had not been based upon a finding of fact, but rather was based upon a determination by Secretary Fall that as a matter of law the Interior was estopped from challenging the grant.67 Such a determination could not be res judicata since it was not made within the authority of the Secretary. Only where a statute requires the Secretary to do an affirmative act, such as determining which lands were to pass under the grant, does he possess the power to make the determinations of law as well as fact essential to the performance of that duty.68

While the distinction between law and fact may be difficult if not impossible to make, its application in Tosco is clear. The Mineral Leasing Act imposed no duty of affirmative action on the Secretary regarding the disposition of withdrawn lands subject to mining claims. His only duty was to protect the interests of the United States by granting patents only to qualified applicants. Therefore, the Secretary's determinations of law would not bind either the Government or the claimants until the questions were settled by the courts.69

65. 290 U.S. at 142-43.
66. 278 U.S. 200 (1929).
67. Id. at 217-18.
68. Id. at 218-19.
69. Schopflocher, supra note 62, at 36, focuses on a situation where a prior administrative decision is held null and void for lack of jurisdiction over the parties and concludes that there should be no question that res judicata does not attach to the administrative determination; rather, res judicata would attach only to a judicial affirmance of that action. A footnote in the West decision indicates that the policy of the Interior is not to treat its decisions as res judicata. 278 U.S. at 214 n.4.
It may be argued that the court in Tosco overstated the law when it said that a determination by a tribunal without subject matter jurisdiction was wholly nugatory and not res judicata.\textsuperscript{70} The better approach is that taken by the Restatement of Judgments. It states that a judgment by a court with personal jurisdiction over the parties cannot be collaterally attacked for lack of subject matter jurisdiction unless public policy permits such action.\textsuperscript{71} Factors indicating appropriate public policy grounds for attacking a judgment are: (1) the clear lack of jurisdiction over the subject matter; (2) dependence of the determination as to jurisdiction upon a question of law rather than of fact; (3) the limited jurisdiction of the court; (4) the failure to litigate the question of jurisdiction.\textsuperscript{72}

The district court's broad formulation of the rule was not necessary since all but one of the listed public policy factors creating an exception to the general rule of no collateral attack are applicable to Tosco.\textsuperscript{73} The question of whether the requirement of maintenance in section 37 included the performance of annual assessment work was one of law, not fact. The jurisdiction of the Interior is statutorily limited to matters affecting public lands. Since all administrative agencies are, in a sense, of limited jurisdiction, the proper focus should be upon the extent of the agency's jurisdiction within its particular field. The Interior's jurisdiction over public lands is broad,\textsuperscript{74} but the statute, when properly interpreted, significantly limits the agency's juris-

\textsuperscript{70} However, this principle is also found in 1 Freeman, Judgments § 337 (5th ed. 1925).
\textsuperscript{71} Restatement, Judgments § 207 (Proposed Final Draft 1942) [hereinafter cited as Restatement].
\textsuperscript{72} Ibid. The formulation by the Restatement takes into account the "boot-strap" doctrine of jurisdiction. Restatement § 206, comment a. Under this doctrine, a tribunal is deemed to have jurisdiction to determine its own subject-matter jurisdiction, and this determination is binding at least where the parties were subject to personal jurisdiction and argued the issue of subject-matter jurisdiction before the court. This principle was applied to an administrative proceeding in Stoll v. Gottlieb, 305 U.S. 165, 171-72 (1938); see also Jackson v. Irving Trust Co., 311 U.S. 494, 503 (1941), where the question whether the issue of jurisdiction was actually litigated was held to be immaterial.
\textsuperscript{73} The question of whether "maintenance" included the performance of annual assessment work was not clear; therefore the first public policy factor is inapplicable.
\textsuperscript{74} The defendant in Tosco relied upon this factor as evidence that the Supreme Court had not meant that the Interior acted outside of its subject-matter jurisdiction in the early contest proceedings. Brief for Defendant, p. 17, Oil Shale Corp. v. Udall, 261 F. Supp. 954 (D. Colo. 1966); see Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336 (1963); Cameron v. United States, 252 U.S. 450, 459-60, 464 (1919).
diction. As for the fourth factor, none of the mining claimants in *Tosco* appeared to answer the contest proceedings against their claims. In effect, there was a default judgment and the issue of jurisdiction was never actually litigated by these claimants. The *Restatement* declares that the general rule of no collateral attack is inapplicable where there is no litigation of any issue, even though the party affected was before the court or otherwise subject to its jurisdiction. Hence, although the *Restatement* rule contradicts the broad principle relied upon by the district court, both rules as applied to *Tosco* would appear to reach the same result.

The other issues raised by the parties in *Tosco* were not decided by the district court. However, some comment about them is appropriate since they may be raised on appeal. The Interior's arguments embraced concepts of acquiescence and laches. Both of these concepts imply that the original claimants should have taken some affirmative action after their mining claims were declared invalid during the 1930's.

As to acquiescence, the claimants' conduct must be considered against the background of a mining law under which the miner had contact with the Government only when he sought to patent his claim. Further, a mining claim is intangible and invisible, a mere right of which there is no evidence except a possible record in some remote county court house. Consequently, when the Interior declared the mining claims invalid, no object changed hands. A miner could have sought rehearing, appeal, or judicial review, but there was no statutory nor regulatory time limit on these remedies. Also, the intervention of the *Krushnic* and *Virginia-Colorado* decisions must be considered. These decisions, if read at all, must have assured a miner that his claim was valid. This impression would have been buttressed by the Interior's subsequent opinion in *Shale Oil*. The claimant could have tested this impression by asking for a rehearing or by applying for a patent, but there was no duty to apply for

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75. See the findings of fact by the district court, *Oil Shale Corp. v. Udall*, 261 F. Supp. 954, 955-57 (D. Colo. 1966).
76. *Restatement* § 207, comment c.
77. 261 F. Supp. at 965.
78. See notes 17-19 *supra* and accompanying text.
79. See note 15 *supra* and accompanying text.
80. See Coleman v. United States, 363 F.2d 190, 196 n.5 (9th Cir. 1966).
81. See note 46 *supra*.
a patent; and documents introduced in Tosco showed that the Interior, after the Virginia-Colorado decision, answered inquiries of mining claimants to the effect that rehearings were unnecessary. Consequently, the type of affirmative action that should have been taken to avoid the implication of acquiescence is unclear.

The doctrine of laches will probably not be extended to the Tosco situation. As a general rule, laches, to be a valid defense, requires a showing of lack of diligence by the party against whom the defense is asserted and prejudice to the party asserting the defense. The record in Tosco establishes no reliance by the Interior on the effectiveness of the early contest proceedings, nor acquiescence by the plaintiffs in those decisions.

IV. CONCLUSION

The Tosco decision has not ended the legal battles over the disputed mining claims. Undoubtedly, the Interior will appeal the decision of the district court. The mandatory injunctions to issue patents sought by several of the plaintiffs in Tosco will probably not be granted, since the Interior can still refuse on the ground that the claims were abandoned. That issue is clearly within its jurisdiction.

Proceedings within the Interior will therefore be necessary to decide the issue of abandonment. The inactivity with regard to the mining claims for a period of almost thirty years, coupled with the failure of the original claimants to appear and challenge the contest proceedings may sufficiently establish an intent to abandon. Thus, the district court decision represents only the first major hurdle for the claimants.

82. See notes 12-20 supra.
83. 261 F. Supp. at 964 n.3; see Plaintiff's Trial Brief, App., Doc. Nos. 136A, 175, 180-83, at pp. 111-17; Statement of Under Secretary of the Interior John A. Carver, Jr., 1965 Hearings at 42.
85. 261 F. Supp. at 966.
87. The district court in Tosco disagrees with the idea that there may have been abandonment of the mining claims. 261 F. Supp. at 966. But see, Jackson, Legal, Political, and Administrative Problems in Oil Shale, WESTERN RESOURCES CONFERENCE 287, 296-98 (1964). The Interior Department is also threatening to review the issue of discovery with regard to otherwise valid mining claims. Statement by Under Secretary
of the Interior John A. Carver, Jr., 1965 Hearings at 40-41. There is also a possibility that already patented oil shale claims may be subject to challenge. Lohr, Conclusiveness of United States Oil Shale Placer Mining Claim Patents, 43 Denver L.J. 24 (1966). At the time of the Union Oil decision, the Secretary directed commencement of proceedings against all oil shale claims that may be invalid for any reason. Memorandum, Secretary of the Interior to Director, Bureau of Land Management, April 17, 1964.