

**Editor's note: 79 I.D. 27.**

UNITED STATES  
v.  
NEIL STEWART

IBLA 70-134

Decided February 28, 1972

Appeal from decision (Nevada Contests 3332, 3333 and 3361) by Acting Chief, Office of Appeals and Hearings, Bureau of Land Management, holding mining claims null and void and rejecting mineral patent applications.

Affirmed.

Mining Claims: Common Varieties of Minerals: Unique Property

The fact that a deposit of otherwise common sand and gravel may be located in an area where assertedly sand and gravel is scarce does not make it an "uncommon variety", since scarcity is not a unique property inherent in the deposit but is only an extrinsic factor.

Mining Claims: Discovery: Marketability

The Government may raise a presumption that the material on the claim could not be extracted and marketed at a profit

by introducing evidence that claimant has done nothing toward the development of the claim.

Mining Claims: Discovery: Marketability--Mining Claims: Common Varieties of Minerals: Generally

In order to satisfy the requirements for discovery of a mining claim located for common varieties of sand and gravel prior to July 23, 1955, it must be shown the materials could have been extracted, removed, and marketed at a profit prior to that date. Where a mining claimant fails to prove by a preponderance of the evidence that the materials from his claim could have been extracted, removed, and marketed at a profit prior to that date, the claim is properly declared null and void for the lack of a timely discovery of a valuable mineral deposit.

Mining Claims: Discovery: Marketability

The holding of a mining claim as a reserve for a prospective market does not impart validity to the claim.

Rules of Practice: Generally--Rules of Practice: Government  
Contests--Rules of Practice: Supervisory Authority of Secretary

Where the Secretary assumed jurisdiction of a mining claim contest by directing that the hearing examiner forward a recommended decision directly to the Department level, the Secretary was not bound by such directive to decide the case and it was not a violation of due process to return the case to the Director of the Bureau of Land Management to render the initial decision under the then prevailing adjudicative procedure.

Administrative Procedure: Decisions

The Administrative Procedure Act, 5 U.S.C. § 557(c)(A), does not require that an initial decision must incorporate a ruling on each finding and conclusion made in the recommended decision of the hearing examiner but rather it is sufficient if the initial decision contains a statement of its findings, conclusions, and the reasons or basis therefor.

APPEARANCES: Thomas L. Steffen for the appellant; Otto Aho, Field Solicitor, Department of the Interior for the appellee.

OPINION BY MR. FISHMAN

Neil Stewart has appealed to the Secretary of the Interior 1/ from a decision of the Office of Hearings and Appeals, Bureau of Land Management, dated March 18, 1970, which declared null and void his four placer mining claims.

This proceeding was initiated by contest complaints issued by the acting manager of the Nevada land office wherein the following allegations were made:

With regard to the Crocus No. 10, the Orlette No. 3, and the Dragonfly No. 9 claims: The land embraced within the claims is nonmineral in character, and no discovery of valuable minerals has been made within the limits of the claims because it has not been shown that the mineral materials present could have been marketed at a profit prior to the act of July 23, 1955. Also, with regard to the Crocus No. 10 and the Orlette No. 3 claims: The amended locations of these claims were not made in good faith.

With regard to the Olinda claim: Minerals have not been found within the limits of the claim in sufficient quantity and quality to constitute a valid discovery and no discovery of a valuable mineral has been made within the limits of the claim because it has not been shown that the mineral materials present could have been marketed at

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1/ The Board of Land Appeals has been delegated the authority of the Secretary in deciding appeals to the head of the Department from decisions rendered by Departmental officials relating to public lands. 211 DM 13.5; 35 F.R. 12081.

a profit prior to the segregation of the land from mining entry. 2/

The contestee answered denying these allegations and a hearing was held on July 15 and 16, 1964.

For purposes of expediting the resolution of this particular case, the Assistant Secretary of the Interior directed that the hearing examiner prepare only a recommended decision which was to be forwarded directly to the Departmental level for review and final administrative action by the Department.

The hearing examiner's recommended decision was issued on May 12, 1965. He found that the factors necessary to sustain a valid discovery of a valuable mineral deposit were complied with prior to July 23, 1955, as to all claims in issue and that the record was devoid of any evidence

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2/ The latter charge with respect to the Olinda claim relates to the possible segregation from mining location of all of the area embraced in the Olinda claim by virtue of Nevada Small Tract Classification Order No. 85 of September 4, 1953, for purposes of disposal under the Small Tract Act of June 1, 1938, as amended, 43 U.S.C. § 682a (1970). By regulation, 43 CFR 257.3(b), adopted January 15, 1955, 20 F.R. 366 (now 43 CFR 2731.2(b) (1971)) "Lands classified under the act of June 1, 1938, as amended, will be segregated from all appropriations, including locations under the mining laws. . . ." Hence, it would appear that the appellant must show a discovery of valuable mineral before January 15, 1955, if he is to establish the validity of his claim. Cf. Buch v. Morton, 449 F.2d 600 (9th Cir. 1971). However, this decision will treat July 23, 1955, as the crucial date, its being the date that common varieties of minerals were removed from the ambit of the United States mining laws. 30 U.S.C. § 611 (1970). See United States v. Neil Stewart et al., 1 IBLA 161 (1970).

that the amended locations were not made in good faith. The recommended decision together with the contest file, transcript of hearing and exhibits were forwarded to the Under Secretary of the Interior on May 26, 1965.

On June 2, 1969, the Assistant Secretary, Public Land Management, returned the case to the Director, Bureau of Land Management to render an initial decision. The Bureau decision, rendered on March 19, 1970, reversed the recommended decision of the trial examiner and found that the contestee did not meet the requirements for the discovery of a valuable mineral deposit prior to July 23, 1955, and that the claims were invalid. Since this finding was dispositive of the case, the Bureau decision did not determine whether the so-called amended locations of the Crocus No. 10 and Orlette No. 3 claims were made in good faith or whether the small tract classification regulations issued by the Department effected the segregation of the lands from mining location.

The four claims are located approximately 11 miles from the center of the city of Las Vegas. The Orlette No. 3 was originally located on September 10, 1953, on the NE 1/4 SW 1/4 sec. 29 by Peter A. Schenone and John R. Osborne; however, an amended notice of location by the locators, dated February 28, 1961, described the claim as covering the NW 1/4 NW 1/4 of sec. 29. The Crocus No. 10 was located originally

as the Crocus No. 1 by Everett Foster and De Esta Foster on May 8, 1951, on the SE 1/4 NE 1/4 sec. 29, but an amended notice of location by the locators, dated March 13, 1961, changed the name to Crocus No. 10 and the land description to the SW 1/4 SW 1/4 sec. 20. <sup>3/</sup> The Dragonfly No. 9 was located by Richard B. Borders and Phyllis M. Borders on April 29, 1953, on the SW 1/4 NW 1/4 sec. 29, and the Olinda placer mining claim was located by Arthur Woolley and Ivy Woolley on April 21, 1952, on the NW 1/4 NE 1/4 sec. 29. All of the claims are in T. 22 S., R. 61 E., M.D.M., Nevada.

The claims were deeded to Neil Stewart in 1961. The parties stipulated that the possessory title to the four claims is now vested in Neil Stewart, who holds title to the claims for the Stewart Brothers Company, a partnership consisting of Neil Stewart, Harold Stewart, Gerald Stewart, and Alden Stewart.

The claims were located for, and are being held for, sand and gravel deposits. The facts concerning the material on the claims, its physical properties and composition, the purposes for which the material could be used, the improvements found upon the claims, and the extent

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<sup>3/</sup> These so-called "amendments" involving the establishment of the claims on lands not previously involved would appear to be actual relocations or locations of new claims. As they were made after location of claims for sand and gravel was prohibited by statute, it would appear that they are null and void ab initio. However, our decision is premised on different grounds.

of the deposit are not in dispute. The suitability of the material for all phases of the normal and general uses for which sand and gravel are used in the Las Vegas area was the subject of testimony by the expert witnesses for both parties. The material has no distinct or special mineralogical properties that distinguish it from other sand and gravel deposits in the Las Vegas area, and it cannot be used for purposes over and above the normal and general uses for which sand and gravel are used for fill material, for class 1 and 2 roadbase material, and for asphalt aggregates. On this basis the Bureau decision found that the material on the claims is a common variety of mineral material and falls within the purview of section 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1970), which prohibited as of the date of the Act further location of mining claims for common varieties of sand, gravel, inter alia.

Although the appellant concedes that the sand and gravel on his claim does not have any unique property giving the material a special value for any of the uses for which sand and gravel are used, it is appellant's position that the sand and gravel on his claim is not a "common variety" of sand and gravel within the meaning of 30 U.S.C. § 611 (1970). <sup>4/</sup> Appellant argues that by virtue of the limited supply

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<sup>4/</sup> "Common Varieties" . . . does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value . . . ." 30 U.S.C. § 611 (1970).

of sand and gravel in the Las Vegas area the sand and gravel on his claim is thereby rendered "unique."  
We disagree.

The appellant relies on the testimony of the Bureau's witness, Edward Hollingsworth, that the available reserves of sand and gravel in the Las Vegas area, which were suitable for construction purposes, were in a crucial state in 1955 (Tr. 111), but the evidence does not in any way show that the actual supply of sand and gravel was limited in relation to the demand prior to July 23, 1955. The appellant, who is engaged in the sand and gravel business, testified that he had approximately 1200 acres of sand and gravel claims to a minimum depth of five feet (Tr. 259). He also stated that gravel was plentiful in the Las Vegas Valley area prior to 1955 (Tr. 257) and that two or three of his competitors had good reserve deposits of sand and gravel even as of the time of the hearing (Tr. 251).

Even if the available supply of sand and gravel in the Las Vegas area, suitable for construction purposes was scarce prior to July 23, 1955, this would not satisfy the Department's criterion for an "uncommon variety" of sand and gravel. The Department interprets the 1955 Act as requiring two criteria to meet the definition of "uncommon variety" of sand and gravel: (1) That the deposit have a unique property and (2) that the unique property give the deposit a distinct and special

value. United States v. Bedrock Mining Co., 1 IBLA 21 (1970); United States v. Frank and Wanita Melluzzo, 76 I.D. 160 (1969); United States v. U. S. Minerals Development Corp., 75 I.D. 127, 134 (1968). Only if the material has a unique property is it necessary to consider the second criterion. McClarty v. Secretary of Interior, 408 F.2d 907 (9th Cir. 1969).

The Department has rejected the situs of a mineral deposit as a factor in determining whether or not a deposit of sand and gravel is an uncommon variety. See United States v. Frank and Wanita Melluzzo, *supra*; United States v. Mt. Pinos Development Corp., 75 I.D. 320 (1968). As we stated in Melluzzo: [at 76 I.D. 168]

The act of July 23, 1955, *supra*, states that "common varieties" do not include deposits of sand, gravel, etc., which are valuable "because the deposit has some property giving it a distinct and special value" (Emphasis added). This suggests that a special physical property must inhere in the deposit itself and that factors extrinsic to the deposit are not to be determinative. . . .

We think that the same reasoning is applicable to a contention that a sand and gravel deposit is "unique" by virtue of the scarcity of sand and gravel in the area. We therefore find that the material on the appellant's claims is a "common variety" of sand and gravel within the meaning of 30 U.S.C. § 611 (1970).

Appellant contends that the decision of the Bureau that he did not discover a valuable mineral deposit within the meaning of 30 U.S.C. § 22 (1970) is contrary to the weight of the evidence.

In order to determine whether a claimant has discovered a valuable mineral deposit at any point in time within the meaning of 30 U.S.C. § 22 (1970) the Department has traditionally employed, with judicial approval, the prudent man test. A discovery exists:

. . . [W]here 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 L.D. 455, 457 (1894); see United States v. Coleman, 390 U.S. 599 (1968).

In the case of a widespread nonmetallic mineral the Department, again with judicial approval, requires that a critical factor to be considered in applying the above test is whether or not the claimed material is "presently marketable," that is, whether the mineral in question can be extracted, removed, and marketed at a profit. See United States v. Coleman, supra. In order to meet this marketability test the contestee must show that:

. . . by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such

value that it can be mined, removed and disposed of at a profit.

Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959) citing Layman v. Ellis, 54 I.D. 294, 296 (1933). 5/  
See United States v. William A. McCall, 2 IBLA 64, 78 I.D. 71 (1971).

Since Congress withdrew common varieties of sand and gravel from location under the mining laws on July 23, 1955, 30 U.S.C. § 611 (1970) it must be shown that all the requirements for a valid discovery of a sand and gravel deposit existed as of that date, including a showing that the mineral from the deposit could have been extracted, removed, and marketed at a profit by July 23, 1955. See United States v. Barrows, 404 F.2d 749 (9th Cir. 1968), cert. denied, 394 U.S. 974 (1969); Palmer v. Dredge Corp., 398 F.2d 791 (9th Cir. 1968), cert. denied, 393 U.S. 1066 (1969); United States v. Clear Gravel Enterprises, Inc., 2 IBLA 285 (1971).

The marketability test has been held to be specifically applicable in determining the validity of sand and gravel claims in the Las Vegas area. See Palmer v. Dredge Corp., *supra*; Osborne v. Hammit, Civil No. 414 (D. Nev., August 19, 1964).

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5/ Foster v. Seaton gives an incorrect citation for Layman v. Ellis. The correct citation is 52 L.D. 714 (1929). The 54 I.D. 294 is the citation for Solicitor's Opinion which refers to Layman v. Ellis. However, the quote is from the Solicitor's Opinion.

The contestee has the ultimate burden of proving (the risk of nonpersuasion) that he fulfills the requirements of the above tests and that his claim is therefore valid, but the contestant is required to introduce sufficient evidence to establish a prima facie case that no discovery has been made. See Foster v. Seaton, supra.

The appellant asserts that the contestant failed to prove its prima facie case of a lack of a discovery. We agree with the Bureau's decision that the testimony of the government's witness, Edward Hollingsworth, was sufficient evidence to establish a prima facie case that the appellant did not discover a valuable mineral deposit prior to July 23, 1955.

Hollingsworth, a Bureau of Land Management engineer, testified that he examined all of the contested claims in 1958 and saw no evidence of any removal of material from the claims (Tr. 23) and no evidence that any exploratory tests were conducted on the claims to determine the exact nature of the deposit as to quantity and quality (Tr. 79, 80).

An actual history of development of a claim prior to July 23, 1955, is not essential in order to meet the requirement of marketability. See United States v. Clark County Gravel, Rock, and Concrete Co., A-31025 (March 27, 1970); United States v. Warren E. Wurts and James E. Harmon, 76 I.D. 6 (1969); United States v. E. A. Barrows and Esther Barrows,

76 I.D. 299 (1969), aff'd, 447 F.2d 80 (9th Cir. 1971). On this basis, appellant asserts that a lack of removal of material from his claims, in and of itself, is not sufficient to establish the contestant's prima facie case.

As we pointed out in United States v. E. A. Barrows, supra at 306:

. . . [W]hile the fact that no sale had been made at the critical time is not controlling in itself, the fact that nothing is done toward the development of a claim after its location may raise a presumption that the market value of the minerals found therein was not sufficient to justify the expenditure required to extract and market them. See United States v. Everett Foster et al., 65 I.D. 1 (1958), affirmed in Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Alfred N. Verrue, supra. [75 I.D. 300 (1968).]

In view of this presumption and the testimony of Edward Hollingsworth establishing the above presumption, we believe that the contestant introduced sufficient evidence to establish a prima facie case that the material on the claims could not have been marketed at a profit prior to July 23, 1955.

The appellant argues that the contestant may not rely upon the testimony of Edward Hollingsworth to prove its prima facie case because his original recommendation to the Bureau of Land Management that a discovery had not been made was based upon his erroneous belief that the locators of the claims were not connected with the sand and gravel industry whereas upon his later recognition that the appellant had an established

sand and gravel business he changed his recommendation and found that in view of this fact the contestee had met the tests for a valid discovery.

The opinions or conclusions of a witness do not determine whether the contestant has met its burden of establishing a prima facie case. If evidence has been introduced during the course of the hearing which is sufficient to raise a presumption that the contestee is lacking one of the necessary elements of discovery, i.e., marketability, then the contestee has the burden of overcoming that evidence. Moreover, the determination of the validity of a mining claim cannot rest upon the identity and business of the claim owner.

The appellant argues that the facts preponderate in favor of a valid discovery when subjected to the prudent man and marketability tests. We agree with the Bureau's finding that the contestee's evidence is too vague and inconclusive to show that the materials from the claims in issue could have been extracted and marketed at a profit prior to July 23, 1955.

The claims were not actually deeded to Neil Stewart until 1961. On direct examination the appellant testified that prior to 1953 or 1954 he had a verbal lease with the locators of the four claims with an option to buy the claims and that around 1953 or 1954 written agreements were executed (Tr. 218). On cross-examination, however,

Mr. Stewart testified that he did not exactly recall when his oral lease with the original locators began (Tr. 259) or whether he paid the lessors any money under the terms of the leases. He could not produce the written agreements or could not recall the year the written agreements were executed (Tr. 262).

Vern Mendenhall, a road contractor, testified that he removed approximately 50,000 yards of sand and gravel from the Olinda claim around 1953 and that he had a written lease with Everett Foster before he removed any of the material (Tr. 137). On cross-examination Mendenhall stated that he was not certain of the year he removed the material from the Olinda claim. The Government introduced a written lease between Everett Foster and the Ideal Asphalt Paving Company, Mendenhall's company, dated August 8, 1956, covering the Olinda placer mining claim among others (Ex. 21). Appellant admitted that his lease with the locators of the Olinda claim could have been a year after the execution of the Foster-Ideal Asphalt Paving Company lease (Tr. 264).

We find that the appellant's evidence is insufficient to establish that the material from his claims could have been marketed at a profit prior to July 23, 1955. The appellant has failed to prove the existence of a demand for the material as of that date from these claims. See United States v. William A. McCall, Sr. et al., supra.

The appellant was unable to present any evidence that he removed any material from the claims, other than for assessment work, prior to 1955. He admitted in his testimony that if he removed any material from the four claims for marketing at a profit it was in relation to his operations after 1956 (Tr. 280).

He seeks to explain the absence of a bona fide development of his claims by arguing that since he operated an established sand and gravel business, as a prudent businessman he was entitled to hold sand and gravel reserves without development in order to meet a prospective market based upon a reasonable belief in the continued development of the Las Vegas area which would insure a demand for sand and gravel.

The Department has already held that the holding of a mining claim as a reserve of sand and gravel for future development without present marketability does not impart validity to the claim. United States v. William A. McCall, 1 IBLA 115 (1970); United States v. Fisher Contracting Co., A-28779 (August 21, 1962); United States v. Joseph Schelden, A-29078 (April 26, 1963) and that a prospective market is not sufficient to establish the validity of a claim as of the date when a discovery was required to be shown. United States v. William M. Hinde, A-30634 (July 9, 1968).

The record is devoid of sufficient evidence that the sand and gravel from the appellant's claims could have been mined, removed, and marketed at a profit prior to July 23, 1955.

Edward Hollingsworth testified that there was a market for the sand and gravel from appellant's claims prior to 1955 (Tr. 105, 113), but he also testified that these deposits were "a little bit beyond the fringe of an economic deposit" (Tr. 99). Hollingsworth testified that the amount of reserves left in the Las Vegas valley was very limited as early as 1955 (Tr. 111), but this does not mean that there was a limited supply of sand and gravel relative to the demand at that time. Appellant freely acknowledges that he intended to hold the claims as reserves (Brief to the Board p. 15). The location of claims for the purpose of securing reasonable reserve supplies is not prohibited by the United States mining laws, but claims so located must meet the same standards and pass the same tests of validity as other claims, including a showing of marketability on or before July 23, 1955. Vern Mendenhall testified that he removed and marketed at a profit 50,000 yards of sand and gravel from the appellant's claims but he was unable to say that this was prior to 1955.

Appellant testified that he removed sand and gravel from each of the claims and marketed this material at a profit (Tr. 245) but presented

no testimony that such material was marketed at a profit prior to July 23, 1955, or even that it could have been marketed at a profit prior to that date. He admitted that despite some transactions in sand and gravel prior to July 23, 1955, gravel was plentiful in the Las Vegas area and there was free and easy access to gravel often from "community" pits without paying money for it (Tr. 257). Appellant also testified that he acquired these claims since they were ideally located for a readily foreseeable market in the southern part of the Valley-Strip area, the McCarran Field area, and the Paradise Valley area (Tr. 226). There was no evidence presented, however, that there was a market for sand and gravel from the claims in issue in these areas prior to July 23, 1955. Appellant did testify that he removed material from a state pit three-quarters of a mile from the contested claims and that such material was removed at a profit, but again it was not shown that this removal was prior to July 23, 1955.

Appellant relies on the fact that his claims compare more favorably than another placer claim in the Las Vegas area which was deemed to be a valid discovery. A discovery on one claim does not inure to the benefit of another. United States v. William A. McCall, *supra*; United States v. J. R. Osborne, 77 I.D. 83 (1970); United States v. Charles H. Henrikson, 70 I.D. 212 (1963), *aff'd*, Henrikson v. Udall, 229 F. Supp. 510 (D. Cal. 1964), *aff'd*, 350 F.2d 949 (9th Cir. 1965), *cert. denied*, 380 U.S. 940 (1966).

As we stated in United States v. Clear Gravel Enterprises, supra, at 294:

The lack of proof of sales from the claims as of July 23, 1955, although not completely decisive as to the issue of marketability, suggests that certain factors must have been involved that prevented the sale; i.e., it is indicative that the materials on the claims could not have been extracted, removed, and marketed at a profit as of that date. United States v. Everett Foster et al., 65 I.D. 1 (1958), aff'd, Foster v. Seaton, supra.

The appellant's evidence has failed to overcome the presumption that the sand and gravel on his claims could not be marketed at a profit.

The appellant raises two procedural grounds in urging that the Bureau decision be reversed.

First, the appellant contends that the Department was bound by the requirements of due process to follow the review procedure directed by the Assistant Secretary which provided that the recommended decision of the examiner would be forwarded directly to the Departmental level for a final decision within the Department. The appellant argues that the assumption of jurisdiction of the case by the Bureau of Land Management was prejudicial to him in that he was denied his right to have an expeditious determination of the case at the Departmental level without the detrimental effect of a reversal of the examiner's recommended decision by the Bureau. To support his argument appellant relies on the principle

that an agency is bound to follow its own rules and regulations, citing Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957); United States ex rel Accardi v. Shaughnessy, 347 U.S. 260 (1954); Pacific Molasses Co. v. FTC, 356 F.2d 386 (5th Cir. 1966).

Neither the principle of administrative law stated by the appellant nor the cases cited in support thereof are applicable to this case since the directive issued by the Assistant Secretary cannot be equated to the published rules or regulations of an administrative body. The effective departmental regulations provided that the Director of the Bureau of Land Management could require the examiner to render a recommended decision and the Director could then make the initial decision in the case. 43 CFR 1852.3-8 (1964). Although the Secretary delegated this authority to the Director, he did not divest himself of the power to exercise that authority. The Secretary therefore decided to exercise his discretion to assume jurisdiction of the case, but it cannot be said that he was bound by that decision as an agency is bound by its rules and regulations. Clearly, the Secretary had the discretion to return the case to the Director for an initial decision.

The case thus proceeded in accordance with the prescribed regulations of the Department and therefore appellant's claim of prejudice

due to an unfavorable decision by the Director is not valid. As to any delay caused by the return of the case to the Director, the appellant has not demonstrated how this was prejudicial to his case.

The appellant claims that the decision of the Bureau should be reversed because that decision failed to make or enter findings or rulings of each exception taken to the hearing examiner's recommended decision. Specifically, appellant asserts that the hearing examiner found that it was undisputed that the sand and gravel on appellant's claim could have been marketed at a profit prior to July 23, 1955, but the Bureau's finding stated only that "the most that can be said for contestee's evidence is that there was a generalized demand" as of July 23, 1955, and "contestee's evidence is too vague and inconclusive." The appellant claims that these findings are insufficient to meet the requirements of the Administrative Procedure Act which provides that "the record shall show the ruling on each finding, conclusion, or exception presented." 5 U.S.C. § 557(c) (1970).

The Administrative Procedure Act, 5 U.S.C. § 557(c)(A) (1970), requires that a decision make a ruling on exceptions taken to a recommended or initial decision of an examiner submitted by a party. Here, the parties did not file exceptions to the recommended decision of the examiner. It does not necessarily follow that when an initial decision reverses the recommended decision of an examiner that

"exceptions" exist, or if so, that the initial decision must incorporate a ruling on each "exception" taken to the examiner's decision. Rather, we believe in this situation it is sufficient if the decision comports with the requirement of 5 U.S.C. § 557(c) (1970) that:

. . . all decisions . . . shall include a statement of--(A) findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record. . . .

See American President Lines v. NLRB, 340 F.2d 490 (9th Cir. 1965); and United States v. Chas. Pfizer and Co., Inc., 76 I.D. 331, 352 (1969), petition for reconsideration pending.

The decision by the Bureau more than adequately explained the findings, conclusions, and reasons why the examiner's decision was not adopted. The decision summarized the controlling principles of law and the testimony of witnesses relative thereto and explained the reasons why the appellant's evidence was "too vague and inconclusive" to meet the legal test for a valid discovery.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

Frederick Fishman, Member  
We concur:

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Edward W. Stuebing, Member

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Douglas E. Henriques, Member

