

UNITED STATES v. P. D. PROCTOR ET AL.

A-27899

DecidedMAY 4 1959

Mining Claims: Discovery

To satisfy the requirements of discovery on a placer mining claim located for sand and gravel prior to July 23, 1955, it must be shown that the deposit could prior to that date be extracted, removed and marketed at a profit, and where the evidence is to the contrary the claim is properly declared null and void.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington 25, D. C.

A-27899

United States : Contest No. 7873 (Utah).
v. : Placer mining claims
: declared null and void.
P. D. Proctor et al. : Affirmed.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

P. D. and Martha F. Proctor and J. K. and Lillian Y. Hayes, co-locators, have appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated October 2, 1958, which affirmed the decision of a hearing examiner dated April 19, 1957, holding their two sand and gravel placer mining claims, the Marlil Association Nos. 1 and 2, located on April 16, 1955, in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ and E $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 23, T. 9 S., R. 1 E., S. L. M., Utah, to be null and void.

On November 1, 1956, adverse proceedings were initiated against the claims by the United States, alleging:

- "1. That no discovery of valuable minerals has been made within the limits of the above-described mining claims.
- "2. That the land within the limits of the above-described mining claims is non-mineral in character."

A hearing was held before the hearing examiner on the charges on February 14 and 15, 1957. The City of Payson, Utah, and Utah County, Utah, appeared and were permitted to intervene, by virtue of free use applications filed by them under the provisions of the act of July 31, 1947, as amended (30 U. S. C., 1952 ed., Supp. V, sec. 601).

On April 19, 1957, the hearing examiner rendered his decision holding that there appeared to be no present market for the sand and gravel on the claims; that if a future market should develop the only use to which the sand and gravel could be put is for fill material; that the appellants had failed to discover a valuable mineral deposit within the meaning of the mining laws; and that the claims were null and void. Upon review, the Director affirmed the hearing examiner's conclusions.

Under the mining laws all valuable mineral deposits in the public lands are open to exploration and purchase and the lands in which they are found are open to occupation and purchase except as they may have been withdrawn or reserved for other purposes and except as other provisions may have been made for their disposition (30 U. S. C., 1952 ed., sec. 22). While the lands remain open and until other rights have attached thereto, the discovery of a valuable mineral deposit within the limits of a claim will validate the claim (30 U. S. C., 1952 ed., secs. 23, 35) if other requirements of the mining laws have been met. It has often been held that in order to satisfy the requirement of discovery on a placer mining claim located for sand and gravel, it must be shown that the deposit can be extracted, removed, and marketed at a profit, which includes a favorable showing as to the accessibility of the deposit, bona fides in development, proximity to market, and the existence of a present demand for the sand and gravel. United States v. Everett Foster et al., 65 I. D. 1 (1958); Associate Solicitor's opinion M-36295 (August 1, 1955); Solicitor's opinion, 54 I. D. 294 (1933); Layman et al. v. Ellis, 52 I. D. 714 (1929); United States v. Francis N. Dlouhy et al., A-27668 (September 24, 1958). Whenever the Secretary, or his legal representative, has reason to believe that a mining claimant has failed to make a discovery of valuable minerals on the lands occupied by him, he may withdraw the consent of the United States to the occupation of the lands by filing of adverse proceedings against the claims. Adverse proceedings may be filed either on the Secretary's own motion or in response to a contest initiated by some applicant desiring the use of lands in the mining claims for the same purpose or for some other purpose.

Section 3 of the act of July 23, 1955 (30 U. S. C., 1952 ed., Supp. V, sec. 611), provides that deposits of common varieties of sand and gravel shall not be deemed to be valuable mineral deposits within the meaning of the mining laws so as to give effective validity to any mining claim thereafter located under such law. Since the appellants admit that their claims were located only for sand and gravel and that the sand and gravel had no value as a ready-mix material or for concrete purposes (Tr. 25, 115)^{1/} and did not allege that the sand and gravel was other than a common variety, the claims could have been validated only by a discovery (including marketability) made prior to the enactment of the act of July 23, 1955. United States v. Estate of Victor E. Hanny, A-27362 (September 24, 1957); see United States v. G. C. (Tom) Walkern, A-27746 (January 19, 1959).

The appellants contend that the hearing examiner committed error in law in finding no discovery in view of the fact that the

^{1/} This reference and those to follow are to the transcript of the hearing held on February 14 and 15, 1957.

contest does not involve a conflict of uses of the lands embraced in the mining claims; that there is no evidence that the land has any use or purposes other than for the gravel material therein; and that the contest does not, therefore, involve different uses of the same land, but rather the same use of the land, that is, for the gravel thereon. They assert that the very presence of the intervenors in the contest indicates the value of the land as does the fact that the free-use applications for sand and gravel in the lands involved were filed by the intervenors.

As to the last point, it can readily be admitted that the lands involved have little or no use except for the material therein, but the Department has pointed out that the mere fact that sand and gravel may be sold does not in and of itself establish that a discovery of a valuable deposit of minerals has been made under the mining laws. In United States v. Everett Foster et al., supra, it was stated:

"This is clearly evidenced by the Materials Act of July 31, 1947, as originally enacted (43 U. S. C., 1952 ed., secs. 1185-1187). Section 1 of the act authorizes the Secretary of the Interior to dispose of, among other materials, sand and gravel if the disposal of such materials is not otherwise expressly authorized by law, including the mining laws. Section 1 further requires disposals to be made upon the basis of adequate compensation, with certain exceptions. Section 1, therefore, clearly reflects a congressional understanding that there are sand and gravel deposits on public lands which can be sold but which do not meet the requirements of the mining laws." (P. 4.)

Section 1 of the Materials Act, as amended, also authorizes the Secretary to permit any Federal, State or Territorial agency, unit or subdivision--

"to take and remove, without charge, materials and resources subject to this Act, for use other than for commercial or industrial purposes or resale."

Consequently, since the law provides that a State, county or municipality may remove materials from public lands without charge, the fact that Utah County and the City of Payson elect to exercise that right is immaterial to the basic question of whether or not the mining claimants have discovered a valuable deposit of sand and gravel which will validate the claims.

Turning to the issue of whether a discovery sufficient to validate these sand and gravel claims has been made, it appears from the record that certain facts are clearly established. It is established, and uncontroverted, that none of the sand and gravel has ever been sold by the claimants since the claims were located (Tr. 224); that although material has been removed from the property by the

highway department of Utah County such removal was done under the mistaken impression that the land was private land and that permission had been given to remove the material (Tr. 148-149); that one of the co-locators admitted on cross-examination that the claims were located more or less on the basis of some future demand for the gravel, rather than on any present demand or present market (Tr. 226-227).

As to the quality of the material on the claims the mineral examiner testified on the basis of his training and experience that he believed the materials exposed on the claims could be used for filling purposes, that is, "for base for roads and embankments for railroads and probably for filling in yards around homes and such purposes." (Tr. 32). He also stated many of the pebbles and rocks in the deposit located on the claims contain a calcareous coating which renders these materials objectionable for use in concrete and that, although this coating could probably be removed and the material then used for concrete aggregate, it would be difficult to do so (Tr. 35-36).^{2/}

The testimony of the mineral examiner was largely confirmed by other witnesses called by the contestant and the intervenors. A materials inspector employed by the Utah Road Commission testified about an analysis of a sample tested by him. He stated that the material could not be used as a surfacing material without processing because his analysis indicates a lack of binder; that with proper blending with a binder material it could be used as a surfacing material, but the process would be quite expensive (Tr. 88). He further testified that it would not be economically feasible to add the additional binder material in view of the availability of other deposits, except where the deposit is centrally located near a road under construction (Tr. 89-90). He stated if other materials must be blended with the gravel, either at the plant or on the project, it would raise the price 25 cents (Tr. 97).

An operator of a ready-mix concrete and gravel plant testified that he had been on the property in question several hundred times, that the material on the property was suitable for fill material, and that he would not be able to use the gravel in his business because there would be "too much screening and washing involved. I would not be able to use it unless I had a job where I could use it for fill." (Tr. 119.) On cross-examination he pointed out five deposits of sand and gravel in the Payson City area (Tr. 121-122).

^{2/} The appellants stipulated that there was no gold or other precious metals on the claims and that the claims were located only for the sand and gravel in them (Tr. 25), and that the gravel deposits had no value as a ready-mix material or for concrete purposes (Tr. 115).

The County Commissioner for Utah County in charge of highway department affairs testified concerning sand and gravel deposits owned or used by the county without charge in connection with road construction and repair. He stated that material taken from the claims had been used for gravelling and as base or sub-base for roads (Tr. 148-149). In the course of his testimony a map was introduced in evidence by the intervenors and on it the commissioner marked 14 deposits of sand and gravel in nearby areas which are utilized by Utah County in road construction and repair work (Tr. 175-176) and testified that the county owned 11 of 15 major gravel deposits in the area (Tr. 147). He testified that the county had permission to take material from the four other privately owned pits without charge to it (Tr. 148).

It is clear from the testimony discussed above that the Government established a prima facie showing that the sand and gravel deposits on the claims involved are of a common type in the area of Payson City and may be considered in some respects inferior to other deposits of sand and gravel nearby, that none of the sand and gravel has ever been sold by the claimants, and that if the material was for sale there would appear to be very little demand for it.

I fail to find any convincing evidence introduced by the appellants which tends to rebut the Government's case. The appellants attack the contention that the deposits on the claim was suitable only for "fill" and "fill material" on the ground that the terms were used without precision. However, they did not offer any evidence as to what other use the deposits could be put. The only use they suggested was the possibility that it might be used in the interstate road program or sold to the county or State (Tr. 204, 216, 217).

The appellants also contend that the fact that three free use permit applications were filed for the sand and gravel deposits establishes the fact that there was a current market for them. In the first place, in addition to what was said above, the fact that a city or county desires the free use of a gravel deposit does not mean that it would pay for the deposit. In the second place, the existence of a temporary demand for sand and gravel deposits for fill or road construction in the immediate vicinity of the deposits does not establish that there is a market for them within the meaning of the mining laws. Associate Solicitor's opinion M-36295, supra; see United States v. Black, 64 I. D. 93 (1957).

Other than this use by the local governmental agencies, the testimony of one of the locators appears to confirm the fact that the claims were located only on the basis of a belief that future road construction in or near Payson City would create a demand for sand and gravel from the claims (Tr. 226). In United States v. Everett Foster et al., supra, it was pointed out that " * * * a prospective market, using that term in the sense of a market to be developed in the future, is not sufficient to establish the validity

of a claim under attack at the present time." (P. 8.) See United States v. J. R. Clements, A-27751 (December 15, 1958).

After careful consideration of all the facts revealed in the record, it is my conclusion that a determination that no showing has been made that deposits on the claims can be extracted, removed, and marketed at a profit is unavoidable, and that having made that determination it must be held that no valid discovery has been made and the claims are null and void.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2a(4)(a), Departmental Manual; 24 F. R. 1348), the decision of the Director, Bureau of Land Management, is affirmed.

(Sgd) Edmund T. Fritz
Deputy Solicitor