

UNITED STATES

v.

CHARLES H. HENRIKSON and OLIVER M. HENRIKSON

A-28763

Decided June 4, 1963

Mining Claims: Patent

Patent to a mining claim cannot be withheld where it is shown that the claim is still being worked and the sand and gravel therefrom are still being removed and disposed of at a profit in the current market upon the conjecture that very little sand and gravel still remain on the claim.

¹¹ *Stamas v. Fanning*, 185 N.E. 2d 751 (Mass., 1962).

June 4, 1963

Mining Claims: Common Varieties of Minerals—Mining Claims: Discovery

Where there is no showing that there are within the limits of a mining claim deposits of sand and gravel in sufficient quantities to induce a prudent man to expend his labor and means with a reasonable prospect of developing a valuable operation, there has been no discovery within the meaning of the mining laws.

Surface Resources Act: Applicability

The Surface Resources Act is applicable to mining claims located for sand and gravel prior to July 23, 1955, but not perfected by discovery prior thereto.

Mining Claims: Placer Claims

A 10-acre placer claim consisting of a string of four contiguous 2½-acre tracts straddling three regular 10-acre subdivisions is not thereby invalid as not being in conformity with the public land surveys.

Mining Claims: Mineral Lands

Where a 10-acre placer claim includes land situated within three regular 10-acre subdivisions and a discovery has been made on the land in one 10-acre subdivision, it is not necessary to show that the portions of the claim in the other two 10-acre subdivisions are mineral in character in order to sustain the validity of the entire claim.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Forest Service, Department of Agriculture, has appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated December 2, 1960, affirming a decision by a hearing examiner declaring two mining claims in sec. 28, T. 16 N., R. 16 E., M. D. M., California, within the Tahoe National Forest, to be valid claims.

The first claim, the Squaw Valley Gravel placer mining claim, covering ten acres, was located by Quenton L. Brewer on August 12, 1949, and sold to Charles H. and Oliver M. Henrikson by quitclaim deed dated October 23, 1953. The second claim, the Squaw Creek placer mining claim, covering 20 adjoining acres, was located by the Henriksons on March 6, 1953.

Application for a mineral patent covering the two claims was made on August 29, 1957, and, by decision dated July 17, 1958, portions of the Squaw Creek claim were declared null and void because those portions (parts of Forest lots 46, 48, 50 and 52) were in private ownership and not subject to the mining laws of the United States (30 U.S.C., 1958 ed., sec. 21 *et seq.*). Thereafter, the claimants amended their application for patent to eliminate the lands covered by the Squaw Creek location in private ownership.

On January 27, 1959, the Forest Service recommended the initiation of a contest against both claims on the ground, among others, that minerals have not been found within the limits of each claim in suffi-

cient quantity to constitute a valid discovery. The contest was brought and a hearing had on the validity of the claims. The hearing examiner found that a discovery has been made on both claims.

The Forest Service contends that the Squaw Valley claim has been mined out so that any discovery which may have been made thereon has been lost, and therefore the claimants are not entitled to a patent covering this claim. As to the Squaw Creek claim, the contention is made that there was no discovery of sand and gravel on this claim prior to July 23, 1955, when deposits of common varieties of sand and gravel were declared not to be valuable mineral deposits within the meaning of the mining laws so as to give validity to mining claims thereafter located for such common varieties (30 U.S.C., 1958 ed., sec. 611).

The record made at the hearing has been carefully reviewed and while the evidence presented fully supports the finding of the hearing examiner that a discovery was made prior to July 23, 1955, on the Squaw Valley claim, the evidence does not, in our opinion, support the finding that a discovery was made on the Squaw Creek claim prior to that date.

Before discussing the Squaw Creek claim, we shall consider the Forest Service contention that the Squaw Valley claim has been mined out.

The evidence shows that at the time of the hearing, in July 1959, almost two years after the patent application was filed, the claim was still being worked and while the estimates given by the witnesses for the contestant and for the contestees differ widely as to the amount of sand and gravel still remaining on the claim, all admit that there is still some sand and gravel on the claims. The contestees testified that this sand and gravel is being extracted and sold at a profit in the present market and the Forest Service has not refuted this.

The situation here is not the same as that dealt with in *United States v. Lem A. and Elizabeth D. Houston*, 66 I. D. 161 (1959), upon which the Forest Service relies. In the *Houston* case, there was no evidence of recent mining activities. The claims had been mined out long before the patent application was made. There it was concluded—

* * * on the basis of all of the evidence produced at the hearing that only isolated pockets of mineral ores have been shown to exist on the claims at the present time; that there is lacking conclusive or even substantial evidence that valuable discoveries have been made on each of the claims at times in the past; that, although valuable ores may have been mined from some of the claims in the past, no showing has been made that there still exists on the claims valuable deposits of mineral which would justify a reasonably prudent man in expending his time and money in an effort to develop a paying mine; and that, therefore, the application for patent must be denied.

June 4, 1963

Here, at the time the patent application was made and at the time of the hearing, a paying mine had been developed on the claim and the products of the claim were still being extracted, removed, and sold at a profit to meet the current demand for sand and gravel.

In the circumstances, the conjecture that there is very little sand and gravel remaining on the claim cannot defeat the issuance of a mineral patent.

The hearing examiner apparently based his finding of discovery on the Squaw Creek claim partly on the fact that the claims are contiguous and partly on the fact that some sand and gravel has been sold from the Squaw Creek claim. He stated:

* * * Since these claims are contiguous claims, it is not required that pits be operated on both claims simultaneously or in competition with each other as argued. It is only necessary that it be demonstrated that the materials from each of the claims exist and that they may be sold at a profit. This was demonstrated by the testimony of witnesses that they have removed and sold from the Squaw Creek Placer Claim at least 20 cubic yards of sand and gravel in conjunction with their operation of the Squaw Valley Placer Claim and that an additional amount of top soil has been removed and sold from the Squaw Creek Placer Claim. Thus marketability had been established prior to July 23, 1955.

However, a discovery on one claim does not inure to the benefit of an adjoining claim. Valuable mineral deposits must be found within the limits of each claim (30 U.S.C., 1958 ed., secs. 23, 35). Thus, unless it is shown that there was a discovery on the Squaw Creek claim prior to July 23, 1955, the claim is without validity.

More is required to validate a claim for sand and gravel than merely to see or uncover the sand and gravel on the public domain and file a claim thereon. Before such a claim has any validity it must be shown that the sand and gravel are of a quality acceptable for the type of work being done in the market area, that the extent of the deposit is such that it would be profitable to extract it, and that there is a present demand for the sand and gravel. *United States v. Everett Foster et al.*, 65 I.D. 1, 5 (1958).

There is nothing in the present record to suggest that before July 23, 1955, any attempt had been made to determine the extent of the sand and gravel on the claim.

All that the record shows is that the Henriksons worked the Squaw Valley claim under Brewer for some time and then purchased that claim. One of the claimants testified: "And then we took an adjacent claim there because there was gravel over there, too, and rather than be limited, we figured we had better have another 20 acres there * * *." (Tr. 331.) The claimants built a road into the Squaw Creek claim and made a canal running from the Squaw Valley to the Squaw

Creek for the purpose of draining water from the washing plant then located on the Squaw Valley claim. Both the road and the canal entailed the removal of trees from the Squaw Creek claim (Tr. 335). These improvements were apparently made in 1953, shortly after the claim was located (Tr. 357, 359). The claimants themselves admitted that most of the test holes on the Squaw Creek were "dug recently" (Tr. 358, 364) and that they were dug out of curiosity to see what kind of gravel was down there (Tr. 343); that some of these holes were dug in 1956 and 1957 on behalf of the Olympic Committee (Tr. 299) and that the material taken from these test holes dug for the Committee was good (Tr. 394) and that 6,550 cubic yards of overburden were removed from the claim by stripping. The record is ambiguous as to when that stripping took place. One of the claimants testified that "there are areas that we have excavated on the Squaw Creek Placer area for the development work that I have not mentioned, and that has been overgrown with grass, as shown by the photographs, bushes and the like, which cannot be readily observed at this date, but was done long ago, so we have done improvements on both claims, fully being aware of the requirements, although they are contiguous claims * * *" (Tr. 403).

There was read into the record a part of a deposition made by Oliver M. Henrikson in connection with private litigation (Contestant's Exhibit N), in which Henrikson testified that they had removed gravel from the claim in 1956 and 1957. When asked whether gravel was removed in 1955, Henrikson's reply was "I assume some gravel was removed, yes. We had [to] maintain—[our annual assessment work]." (Tr. 435, 436.) Henrikson also testified that they had sold gravel from the claim but he had no idea of how many cubic yards had been sold since they acquired the claim (Tr. 436).

Charles Henrikson testified that he did not know when the excavations on Squaw Creek were commenced. "We had been digging away at that with a loader for a year or so before to see what we have down there." (Tr. 358.)

Referring to an area within the Squaw Creek claim from which certain material had been removed, Henrikson testified: "We take off the soil, you know, maybe eighteen inches of soil there, and till, and in order to do certain improvement work, you had to take out the material, so we just at random brought our loaders in there and took out several loads and put it through the screening plant and took it off the Squaw Creek Placer." (Tr. 358.) Later, Henrikson testified that gravel (approximately 20 loads) had been taken from the claim "over a number of years" (Tr. 361).

Nowhere in the record is there any indication that, prior to July 23, 1955, the claimants had done anything to determine whether the sand

June 4, 1963

and gravel which they found on the claim, apparently by casual observation, existed in such quantities that its removal would be worthwhile. That its quality may have been similar to that found on the Squaw Valley claim is not enough if there was not shown, by July 23, 1955, to be present on the claim a sufficient quantity to persuade an ordinarily prudent man to expend his labor and means, with a reasonable prospect of developing a valuable sand and gravel operation. The fact that an additional requirement is made with respect to claims located for sand and gravel and other minerals of wide-spread occurrence, i.e., that there must be present marketability (*Foster v. Seaton*, 271 F. 2d 836 (D.C. Cir. 1959)) does not relieve the claimants from making such a showing. Marketability alone will not suffice (*United States v. Quenton L. Brewer et al.*, A-27908 (December 29, 1959); Solicitor's opinion, M-36295 (August 1, 1955)).

The appellees' argument that the act of July 23, 1955, is not applicable to this claim since the act applies only to claims thereafter located is not sound. The Department has recently held that the act is applicable to lands included in mining claims located prior to that date but not perfected by discovery prior thereto. *United States v. Kenneth F. and George A. Carlile*, 67 I.D. 417 (1960).

Therefore, as the mining claimants did not show that the Squaw Creek claim was validated by discovery prior to July 23, 1955, the claim must be declared null and void and the patent application covering this claim must be rejected.

Two remaining contentions of the Forest Service require consideration. One is that the claims as located do not conform to the public land surveys in that they are long and narrow, wholly unrelated to the usual square subdivisions. The second is that if a discovery is found to exist anywhere on either claim, the legal subdivisions, outside of the subdivision on which there has been discovery, cannot be included in the patent unless they are shown to be mineral in character.

As we have found that there has been no discovery on the Squaw Creek claim, the contentions of the Forest Service will be considered only as they relate to the Squaw Valley claim.

The location notice covering the Squaw Valley claim identifies the ten acres included in the claim as the $NW\frac{1}{4}NW\frac{1}{4}NE\frac{1}{4}SE\frac{1}{4}$, the $N\frac{1}{2}NE\frac{1}{4}NW\frac{1}{4}SE\frac{1}{4}$, and the $NE\frac{1}{4}NW\frac{1}{4}NW\frac{1}{4}SE\frac{1}{4}$ of sec. 28, T. 16 N., R. 16 E., M.D.B. & M., California. Thus the claim is 1,320 feet long and 330 feet in width. It covers portions of two quarter-quarter sections of sec. 28 and embraces portions of three 10-acre subdivisions of the $SE\frac{1}{4}$ of the section.

The mining laws provide that:

Claims usually called "placers," * * * shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands. (Rev. Stats. sec. 2329; 30 U.S.C., 1958 ed., sec. 35.)

* * * Where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the 10th day of May, 1872, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; * * *. (Rev. Stats. sec. 2331; 30 U.S.C., 1958 ed., sec. 35.)

Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim, made after the 9th day of July, 1870, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; * * *. (Rev. Stats. sec. 2330; 30 U.S.C., 1958 ed., sec. 36.)

The pertinent regulations provide that under the authority of the provision last quoted the 10-acre tracts subdivided out of the 40-acre legal subdivisions should be considered and dealt with as legal subdivisions and that an applicant having a placer claim which conforms to one or more of such 10-acre tracts, contiguous in case of two or more tracts, may make entry thereof, after the usual proceedings, without further survey or plat. 43 CFR 185.26.

The regulations also require that placer claims

* * * shall conform as near as practicable with the United States system of public-land surveys and the rectangular subdivisions of such surveys, whether the locations are upon surveyed or unsurveyed lands. 43 CFR 185.28(a).

* * * * *

Where a placer location by one or two persons can be entirely included within a square 40-acre tract, by three or four persons within two square 40-acre tracts placed end to end, by five or six persons within three square 40-acre tracts, and by seven or eight persons within four square 40-acre tracts, such locations will be regarded as within the requirements, where strict conformity is impracticable. 43 CFR 185.28(c).

Whether a placer location conforms reasonably with the legal subdivisions of the public surveys is a question of fact to be determined in each case, and no location will be passed to patent without satisfactory evidence in this regard. Claimants should bear in mind that it is the policy of the Government to have all entries whether of agricultural or mineral lands as compact and regular in form as reasonably practicable, and that it will not permit or sanction entries or locations which cut the public domain into long narrow strips or grossly irregular or fantastically shaped tracts. (Snow Flake Fraction Placer, 37 L.D. 250 (1908.) 43 CFR 185.28(d).)

June 4, 1963

The Departmental decision cited in the regulation, rendered on November 14, 1908, reviewed at some length the past practices of the Department. It found that, relying on early decisions of the Department (*William Rablin*, 2 L.D. 764 (1884), and *Pearsall and Freeman*, 6 L.D. 227 (1887)), placer miners had located claims of every conceivable form and that placer claims of all shapes and forms had been presented and approved for patent, with little or no attention being given to the conformity provision of the statute. In reviewing the disallowance of patent in the case of *Miller Placer Claim*, 30 L.D. 225 (1900), wherein the claim covered two large tracts of land over three miles apart connected by a narrow strip of land over three miles long, apparently from 30 to 50 feet wide, it said:

* * * The Department disallowed the claim because it not only failed to approximately conform to the United States system of public land surveys and the rectangular subdivisions thereof but appeared to be totally at variance with such system, holding that the law affords no warrant for cutting the public lands into lengthy strips of such narrow width and such great length, whether the claim be located on surveyed or unsurveyed lands. (37 L. D. 253.)

The Department found, however, after noting other decisions on the subject, that it had observed a more rigid interpretation of the letter of the mining law than was warranted by a just regard for the mining conditions and customs and the interests in harmony therewith which must have been within the legislative contemplation.

After reviewing the amendment to the mining law made in 1872 (*Rev. Stats. 2331, supra*), the Department said:

* * * It not only waives further survey and plat when locations upon surveyed lands conform to legal subdivisions but impliedly contemplates cases of non-conformity. The act also by necessary implication recognizes locations upon unsurveyed lands. Then follows the broad provision that "All placer mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public land surveys and the rectangular subdivisions of such survey;" clearly meaning that these limitations shall apply whether the locations be upon surveyed or unsurveyed land. (P. 256.)

The Department concluded:

Each case presented must be considered and decided on its own facts. Conformity is required if practicable. In the interest of wise administration and under the power which we think Congress has vested in this Department in the phrase "shall conform as near as practicable," taken from section 2331, *supra*, and in order to keep claims in compact form and not split the public domain into narrow, long and irregular strips, and to provide for a less harsh rule than that which has been followed recently, and to cover cases where strict conformity is impracticable, it is the view of this Department that a claim hereafter located by one or two persons which can be entirely included within a square forty-acre tract, and a claim located by three or four persons which can be entirely included in two square forty-acre tracts placed end to end, and

a claim located by five or six persons which can be entirely included in three square forty-acre tracts, and a claim located by seven or eight persons which can be entirely included in four square forty-acre tracts, should be approved. In stating this rule it is necessary to say that we do not intend that the forties which are made the unit of measure should necessarily have north-and-south and east-and-west boundary lines. Thus, no inordinately long and narrow claim could be patented, and no locator would be compelled to include non-placer ground unless he so desired, as was permitted in the case of Hogan and Idaho Placer Mining Claims, *supra*. (Pp. 258-59.)

While the claim here under consideration does not conform to the usual 10-acre legal subdivision, we do not believe that it comes within the scope of such a claim as was considered in the *Miller* case or that the allowance thereof would cut the public domain into long, narrow, or grossly irregular or fantastic shape. The claimants show that the land on the north of the claim is patented and that the claim is bounded east and west by mountains. They assert that the claim was located to cover the terminal moraine in which the sand and gravel is found. And, it is to be noted, the Squaw Valley claim can be encompassed within a square 40-acre tract.

We do not agree with the other contention of the Forest Service as it relates to Squaw Valley. This contention, as indicated earlier, is that since the claim straddles three regular 10-acre subdivisions ($NW\frac{1}{4}NW\frac{1}{4}SE\frac{1}{4}$, $NE\frac{1}{4}NW\frac{1}{4}SE\frac{1}{4}$, and $NW\frac{1}{4}NE\frac{1}{4}SE\frac{1}{4}$) the portion of the claim in each of the regular 10-acre subdivisions must be shown to be mineral in character, although the entire claim comprises only 10 acres.

We do not believe that the departmental decision cited by the Forest Service supports its position. In that case, *American Smelting and Refining Company*, 39 L. D. 299 (1910), the Department was concerned with an application for patent covering nine claims, eight of which embraced 160 acres each and the other over 155 acres. Of the total acreage applied for, 1425.194 acres, a report of a special agent indicated that over one-third, or 517.6 acres, consisting of various amounts in seven of the claims, were not mineral lands. On the basis of that report the Land Office directed proceedings against those lands, specifically described by 10-acre tracts in each of the claims, on the ground that those tracts were not mineral in character. The company resisted the proceeding, urging that the order directing the hearing was unwarranted. The Department quoted with approval from an earlier decision (*Ferrell et al. v. Hoge et al.*, on review, 29 L. D. 12, 15 (1899)):

Considering all the statutes relating to mining claims it seems clear that it was not their purpose to permit the entire area allowed as a placer claim to be acquired as appurtenant to placer deposits irrespective of their extent. Under the law discovery of mineral deposits is an essential act in the acquisition of mineral land, and while a single discovery is sufficient to authorize the location

June 4, 1963

of a placer claim and may, in the absence of any claim or evidence to the contrary, be treated as sufficiently establishing the mineral character of the entire claim to justify the patenting thereof, such single discovery does not conclusively establish the mineral character of all the land included in the claim so as to preclude further inquiry in respect thereto.

It would not comport with the spirit of the mining laws to hold that where a placer mineral deposit is covered in any forty acre subdivision of the public lands, an association of eight persons is authorized to embrace in a mining location founded upon such discovery three other contiguous forty acre subdivisions of non-mineral land and to receive a patent for the same as a part of their mining claim, and yet this would logically follow if the contention of these mineral claimants were sustained.

In answer to another contention by the company that 20-acre tracts should be the unit of investigation and elimination, the Department said:

* * * The statute, mining regulations, and decisions clearly contemplate that a placer location may be made of a 10-acre tract in square form. If such a tract, whether in a location by itself or included with other such tracts in a maximum location, is proven to be nonplacer ground, such tract can not pass to entry and patent under the placer application. (39 L. D. 299, 301.)

The Department then reviewed the mining regulations and decisions and held:

In accordance with the foregoing it has been the practice of the land department to order hearings upon protest charging the non-mineral character of lands embraced in applications for placer patents and to investigate and determine the actual character of such lands, when called in question, and to eliminate the adjudged non-mineral land from the placer claim by rejecting the placer application or cancelling the entry *pro tanto*. (39 L. D. 299, 304.)

In the case of the Squaw Valley claim, the Forest Service challenged the mineral character of the claim, which embraces only 10 acres in all. The charge was not sustained. A discovery was shown to exist within the confines of the 10-acre tract and we believe that is sufficient to validate the entire claim. The situation is not at all analogous to the *American Smelting* case, *supra*, which dealt with association claims 16 times the size of the Squaw Valley claim and which ordered a hearing to test the character of the lands in question. As noted above, a hearing was had in this case and the charge that this 10-acre tract is nonmineral in character was not proved.

In the circumstances of this case, we believe that no violence to the mining laws would be done by permitting the Squaw Valley claim to go to patent.

The Forest Service requested an opportunity to present oral argument in support of its appeal covering the two claims. However, as the decision in this case turns upon the evidence adduced at the hearing and upon the proper application of the mining laws to the facts and as the Forest Service has fully set forth its analysis of the evi-

dence and the law no useful purpose would be served by hearing oral argument. Accordingly, its request is denied.

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, insofar as his decision affirmed the holding of the hearing examiner that the Squaw Valley Gravel placer mining claim is a valid claim, entitled to patent, is affirmed and his decision, insofar as it upheld the hearing examiner in declaring the Squaw Creek placer mining claim to be a valid claim, is reversed.

EDWARD WEINBERG,
Deputy Solicitor.