

the surfaces of the claims to the condition in which they were immediately prior to those operations should indicate that the permission to engage in placer mining does not extend to any Forest Service improvements within the boundaries of the claims.

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 decisions of the Director of the Bureau of Land Management are modified and the cases are remanded to the Bureau for action consistent with this decision.

EDWARD WEINBERG,  
*Deputy Solicitor.*

**UNITED STATES v. FRANK MELLUZZO ET AL.**

**A-29074**

*Decided May 20, 1963*

**Mining Claims: Common Varieties of Minerals**

A mining claim, the validity of which is challenged under section 3 of the act of July 23, 1955, is properly held to be null and void when the claimant's evidence shows that the great bulk of sales of stone from the claim are for ordinary construction purposes and that only two small sales of a better quality of the stone were made for lapidary purposes.

**Mining Claims: Common Varieties of Minerals**

Where a mining claim contains a large deposit of quartz suitable for ordinary construction purposes but scattered in the deposit are small pockets of pink or rose quartz suitable for lapidary purposes, it is questionable whether the pockets can be considered as a separate deposit of an uncommon variety of stone apart from the general deposit of which they are a part.

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

Two sales of an uncommon variety of stone for \$260 in a period of two years fall far short of establishing that the stone constitutes a valuable mineral deposit which will establish the validity of a mining claim.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Frank and Geno Melluzzo have appealed to the Secretary of the Interior from a decision dated June 6, 1961, by which the Acting Appeals Officer affirmed a decision of a hearing examiner declaring their Pink Lady lode and Pink Lady placer mining claims, within the Tonto National Forest in Maricopa County, Arizona, embracing substantially the same land, null and void for want of a discovery of a locatable mineral within the claims as such minerals are defined in

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the mining laws, particularly section 3 of the act of July 23, 1955 (30 U.S.C., 1958 ed., sec. 611).

It is established in this case that the claims were located in 1958 for the large quantities of pink quartz which are exposed in a huge outcrop on the claims. The hearing examiner found that the contestees had established that quartz has been removed from the claims and marketed at a profit and that a continuing market exists for it. He found, however, that the pink quartz exposed on the claims is a "common variety" of mineral within the meaning of the mining laws and, therefore, not a locatable mineral. He concluded that the claims are null and void for this reason. The Acting Appeals Officer affirmed on the same ground.

In their appeal to the Secretary, the appellants concede that the successful marketing of the mineral exposed on the claim is immaterial if, in fact, it is not a mineral for which a mining claim could be located in 1958. They base their case for the validity of the claims upon the contention that the pink quartz found on the claims is an uncommon variety of stone, which is semiprecious in character, and that it is, therefore, a locatable mineral.

Section 3 of the act of July 23, 1955, *supra*, reads in applicable part:

A deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws; \* \* \*. "Common varieties" \* \* \* does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value \* \* \*.

At the time the claims were located the applicable departmental regulation provided:

"Common varieties" as defined by decision of the Department and of the courts include deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. \* \* \* (43 CFR, 1961, Supp., 185.121(b).<sup>1</sup>

The Government's sole witness, the mining engineer who examined the claims, estimated that there are 40,000 to 50,000 tons of pink quartz on the appellants' claims, at least 40,000 tons in two other deposits in the same area and at least a million tons outcropping for several miles on the east side of the Huachuca Mountains in the State of Arizona (Tr. 80-81, 76-77).<sup>2</sup> There are other deposits in the ad-

<sup>1</sup> This regulation was amended on September 7, 1962 (27 F.R. 9138), but without change so far as the questions in this case are concerned.

<sup>2</sup> This and subsequent references are to the pages of the transcript of the hearing.

joining State of New Mexico and a very large deposit in South Dakota (Tr. 77-78). He testified that the pink quartz could be used as decorative stone in fireplaces, patio walls and planters and for tombstones and coping (Tr. 30-31). He disparaged the use of the pink quartz for jewelry purposes, testifying that after exposure to heat and weather the pink color fades from pink quartz and that the use of the quartz found on the claims as a gem could not extend beyond a limited sucker trade.

The appellants' contention that the pink quartz found on the claims has special and distinct value and is therefore an uncommon variety of stone is based principally upon the fact that rose quartz, which they say the pink quartz is, is classified by numerous authorities as a gem stone or semi-precious stone. They point to testimony by Frank Melluzzo, their sole witness, that he sold 500 pounds of cutting rose quartz at 50 cents per pound to a local lapidary shop (Tr. 102) and 20 pounds of the same at the same price to a rock shop in Colorado (Tr. 105). There was also introduced into evidence at the hearing rose quartz from the claims that had been fabricated into costume jewelry.

However, Melluzzo, who is in the stone business, testified that the pink quartz had been used in a fountain, for entry-way floors, table tops, lamps and book ends, and in an island traffic divider (Tr. 89, 92-93). Sales slips were introduced into evidence showing that except for the two sales of 520 pounds to the lapidary and rock shops, some 82 tons were sold presumably for construction and similar purposes. The great majority of sales were at \$35 per ton; others ranged from \$20 to \$40 per ton. (Contestees' Ex. F, G, J1-J37). The sales records show that the 82 tons were sold for a total amount of approximately \$6,135.<sup>3</sup>

The evidence reveals then that of total sales of pink quartz from the claims only  $\frac{3}{10}$  of one percent by weight and 4 percent by value was sold for lapidary purposes at 50 cents per pound. The remainder was sold for construction or similar purposes generally for \$35 per ton, which converts to .0175 cent per pound. Thus the great bulk by far of the pink quartz was sold for the ordinary uses to which any colored building stone is put.

Appellants attempt to distinguish pink quartz from common varieties of stone solely on a price basis. They contend that common stone is sand, rock and other materials which can generally be purchased for anywhere from 25 cents a yard or ton to \$4, \$5, or \$10

<sup>3</sup> One or two of the sales slips are not quite clear and the total sales of approximately \$6,135 compiled from the slips does not accord with Melluzzo's testimony of sales of \$5,575.52 (Tr. 121).

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per ton and that distinctive stone, like the pink quartz, which sells for \$25 to \$35 per ton and selected pieces at 50 cents per pound is certainly not common stone.

The answer to this contention is that there is nothing in the statute to show that price is the pertinent criterion for determining whether a mineral is a common variety. It is only a factor that may be of relevance. There is a far greater discrepancy between the price of 50 cents per pound at which 520 pounds of pink quartz were sold and the price of .0175 cent per pound at which 82 tons were sold than between the price of \$10 per ton which the appellants would say marks a common variety of stone and \$25 per ton which they say would mark an uncommon stone.

Section 3 of the act of July 23, 1955, *supra*, provides that a *deposit* of common varieties of stone shall not be deemed a valuable mineral *deposit* under the mining laws and that the term "common varieties" does not include *deposits* which are valuable because the *deposit* has some property giving it distinct and special value. Assuming that the small amount of pink quartz in the claims sold for lapidary purposes can be considered as having a distinct and special value, the question arises whether this particular quartz can be segregated from the mass of pink quartz on the claims and considered to be a deposit by itself or whether it is to be regarded simply as a part of one deposit of pink quartz. The evidence indicates that there is a single outcrop of quartz on the claims which consists of white, pink, yellow, and reddish quartz (Tr. 18). Melluzzo testified that in mining the pink quartz, "every now and then you run into maybe fifty or a hundred pounds of rose quartz that has qualities in there that are free of any chips or cracks or any seams that can be cut and faceted into stones for earrings, rings and brooches. That type of rock I sell to lapidaries for 50 cents a pound \* \* \*" (Tr. 89). This clearly indicates that small pockets of lapidary pink quartz are scattered in the great mass of lower quality pink and other quartz.

In the physical circumstances presented here, I am inclined to the view that the lapidary pink quartz cannot be said to constitute a *deposit* of mineral as distinct from the deposit of lower grade pink and other quartz throughout which it is disseminated, and that there is on the claims but one deposit of stone which can fairly be described only as a common variety of stone.

It is not necessary, however, to rest the decision on this ground, for even if the lapidary pink quartz were to be considered as a separate distinct deposit by itself, the appellants have produced nothing in the way of substantial or persuasive evidence that it is a valuable mineral

deposit. Two sales totaling 520 pounds for \$260 in the two years following the location of the claims fall far short of establishing that the lapidary pink quartz constitutes a valuable mineral deposit.

The claims were properly declared null and void for lack of discovery of a valuable locatable deposit of mineral.

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 appealed from is affirmed.

EDWARD WEINBERG,  
*Deputy Solicitor.*

### CLAIM OF MRS. HANNAH COHEN

TA-247

*Decided May 22, 1963*

#### Torts: Licensees and Invitees—Torts: Parks

In accordance with Wyoming law, a visitor to Yellowstone National Park is held to be an invitee. The duty owed to the visitor by the Government is to use ordinary and reasonable care to keep the premises reasonably safe for his visit and to warn him of any hidden danger. The Government is not an insurer of the safety of the visitor.

#### Torts: Parks

The mere fact that loose stones or gravel are present on an outdoor walk in a national park, and cause a visitor to the park to fall, does not establish either that the walk is dangerous *per se*, or that the walk is maintained in a negligent manner. In the absence of facts showing that the Government employees had a reasonable opportunity to discover the presence of the stones or gravel on the walk, and to remove them, no negligent or wrongful act can be imputed to the Government employees.

#### ADMINISTRATIVE DETERMINATION

Mrs. Hannah Cohen, of Providence, Rhode Island, by and through her attorneys, Decof, Abatuno and Brill, of Providence, Rhode Island, has timely appealed from the administrative determination (T-D-0-75) of September 18, 1962, by the Field Solicitor, Omaha, Nebraska, denying her claim in the amount of \$2,500 for personal injuries.

Appellant states<sup>1</sup> that on Thursday, June 22, 1961, she and her husband—

purchased ticket for admission to Yellowstone National Park, Permit No. 2914. After parking car, walked by museum toward Basin. [She] slipped on loose gravel located on incline toward Basin used by visitors to reach the Basin.

<sup>1</sup> Standard Form 95, Claim for Damage or Injury, submitted by appellant.