

## UNITED STATES

V.

KELLY SHANNON ET AL.

A-29166

*Decided April 12, 1963***Mining Claims: Common Varieties of Minerals—Mining Claims: Discovery**

To satisfy the requirement for discovery on a placer mining claim located for decorative building stone and clay before July 23, 1955, it must be shown that the materials within the limits of the claim could have been extracted, removed, and marketed at a profit before that date and when such showing is not made the mining claim is properly declared null and void.

**Mining Claims: Discovery—Mining Claims: Contests**

A mining claimant has the burden of proving in a contest against his claim that a discovery has been made after the Government has made a prima facie case that the claim is invalid for want of a discovery of a valuable mineral deposit.

**Mining Claims: Common Varieties of Minerals**

Building stone suitable for construction purposes which is found in pleasing colors, which splits readily and can be polished satisfactorily, but can be used only for the same purposes as other available building stone is a common variety of building stone and not locatable under the mining laws since its special characteristics do not give it a special distinct value.

**Mining Claims: Common Varieties of Minerals**

Clay found on a mining claim which the claimant believes to be valuable but which laboratory tests show to be unsuitable for an oil-bleaching material or as a catalytic agent even with acid treatment to increase its absorbency cannot be regarded as an uncommon variety of clay on the basis of one sale for mixing in stone plaster.

**APPEALS FROM THE BUREAU OF LAND MANAGEMENT**

Kelly Shannon, Helen B. Harrell, Mary M. Sprague, Carl E. Pagh, Mrs. Rose M. Pagh, Alma M. Dillman, Ray E. Dillman, Josephine M. Shannon, Hazel V. Key, James W. Key, E. H. Kitchen, and H. C. Clarke have appealed to the Secretary of the Interior from a decision dated August 7, 1961, by which the Acting Chief, Division of Appeals, Bureau of Land Management, affirmed a decision of a hearing examiner declaring null and void their five placer mining claims located in Kern County, California, for agatized rock and clay. The declaration was predicated upon evidence introduced at a hearing on June 22 and 23, 1960, in the course of contest proceedings brought in the name of the United States against the five claims.

In their appeal to the Secretary, the appellants contend that the Bureau of Land Management ignored the mining laws and the decisions of the courts in its determination of what constitutes a discovery of valuable mineral deposits and thus attempted to usurp

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the function of the Congress by formulating new and additional tests of discovery and that the decision appealed from disregards the evidence introduced by the claimants and bases the decision upon selected portions of the Government's evidence in derogation of section 7 of the Administrative Procedure Act (5 U.S.C., 1958 ed., sec. 1006(c)). To support their first contention, the claimants contend (1) that the act of July 23, 1955 (30 U.S.C., 1958 ed., secs. 611-615), is not applicable to their claims; (2) that the Government has the burden of proving that the claims are invalid; (3) that a showing of commercial ore is not essential to establish a discovery on a mining claim; and (4) that the stone found on their claims is not a common variety as described in section 3 of the act of July 23, 1955 (30 U.S.C., 1958 ed., sec. 611).

The record in this case discloses that the claimants allege that three of the claims were located previous to enactment of the act of July 23, 1955, section 3 of which (*supra*) declares that:

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" as used in this Act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more.

The Burway No. 1, they assert, was located on December 2, 1939, the Fool's Paradise on May 3, 1948, and the Eight Kids on May 15, 1951. An application for patent (Los Angeles 0161525) to these three claims, totaling 320 acres, was filed on November 25, 1958, alleging that they contained valuable deposits of decorative building stone, bentonite, clay, some silver, gold and/or tungsten. They assert that the Hit Parade and the Ace in the Hole were located on June 1, 1957. No application for patent including these claims has been filed. The Bureau initiated contests against all five claims.

At the consolidated hearing on these contests, the issue stated by the hearing examiner was the validity of the claims arising from the Government's charges that minerals had not been found within the limits of the claims in such quantities as to constitute a valid discovery; that the materials present on the claims could not be marketed at a profit; and that an actual existing market had not been shown to exist for the materials. In the course of the hearing, the claimants eliminated their claim to a discovery of gold, silver, tungsten, and uranium (Tr. 32-34)<sup>1</sup> and based their case on decorative building stone, which

<sup>1</sup> This and subsequent references are to the appropriate page or pages of the transcript of the hearing.

they referred to as agate, and clay, which they referred to as Fuller's earth and Montmorillonite.

It is apparent that as to the three claims for which a patent application was filed, location procedures were, at least, attempted before common varieties of minerals were declared not to be locatable under the mining laws. But the mining law declares that:

\* \* \* no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. (30 U.S.C., 1958 ed., sec 23.)  
and

Claims usually called "placers," including all forms of deposit, \* \* \* shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; \* \* \*. (30 U.S.C., 1958 ed., sec. 35.)

Hence, the fact that the claimants staked out the boundaries of their claims and recorded the location notices before July 23, 1955, does not make their claims valid.

In *Cole v. Ralph*, 252 U.S. 286, 295-296 (1920), the United States Supreme Court declared:

A location based upon discovery gives an exclusive right of possession and enjoyment, is property in the fullest sense, is subject to sale and other forms of disposal, and so long as it is kept alive by performance of the required annual assessment work prevents any adverse location of the land. *Gwillim v. Donnellan*, 115 U.S. 45, 49; *Swanson v. Sears*, 224 U.S. 180.

While the two kinds of location—lode and placer—differ in some respects, a discovery within the limits of the claim is equally essential to both. \* \* \*

Location is the act or series of acts whereby the boundaries of the claim are marked, etc., but it confers no right in the absence of discovery, both being essential to a valid claim. *Waskey v. Hammer*, 223 U.S. 85, 90-91; \* \* \*. Nor does assessment work take the place of discovery, for the requirement relating to such work is in the nature of a condition subsequent to a perfected and valid claim and has "nothing to do with locating or holding a claim before discovery." *Union Oil Co. v. Smith*, *supra*, p. 350. In practice discovery usually precedes location, and the statute treats it as the initial act. But in the absence of an intervening right it is no objection that the usual and statutory order is reversed. In such a case the location becomes effective from the date of discovery; but in the presence of an intervening right it must remain of no effect. \* \* \*

As to the two claims for which no application for patent was filed, their validity must, clearly, depend upon a showing of a discovery and also that the mineral deposits claimed are outside the purview of common varieties within the meaning of the act of July 23, 1955.

The mining law requires a discovery of a valuable mineral deposit to validate a mining claim but does not define "discovery." However, the standard applied by the Department in *Castle v. Womble*, 19 L.D. 455, 457 (1894), was expressly approved by the United States Supreme Court in *Chrisman v. Miller*, 197 U.S. 313, 322 (1905). Thus the rule is that:

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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, the requirements of the statute have been met.

Because the mineral deposits which the claimants allege they had discovered are nonmetalliferous minerals often of widespread occurrence, it is necessary, in order to meet this test, to show present marketability. The claimants have characterized this requirement as legislation by the Department with no judicial support except in the decision of the United States Court of Appeals for the District of Columbia in *Foster v. Seaton*, 271 F. 2d 836, 838 (1959), in which the court approved such requirement as essential "to prevent the misappropriation of lands containing these materials by persons seeking to acquire such lands for purposes other than mining." The claimants refuse to be bound by this decision on the ground that it is contrary to decisions of the Supreme Court of the United States, although no decisions as to which it is *contra* are cited. However, the Department is bound by this decision and by the decision in *Ickes v. Underwood*, 141 F. 2d 546 (D.C. Cir. 1944), *cert. denied*, 323 U.S. 713 (1944), which the claimants have not challenged. In the latter case, the court said (at page 549):

The decision of the Secretary of the Interior, in the present case, turned upon his finding of fact that the deposits of sand and gravel in question were neither presently nor prospectively valuable for mineral use, before or at the time of the appropriation of the land for public use. His decision, and the finding upon which it is based, have abundant support in the record. Moreover, the decision was clearly within the scope of his authority; and in the absence of fraud or imposition is conclusive.

Thus it was proper to require a showing of present marketability as an element of the discovery of valuable mineral deposits on the claims in controversy.<sup>2</sup>

Likewise, there is ample judicial support for placing upon the claimants the burden of establishing the validity of the claims by a

<sup>2</sup> It should also be noted that in four separate recent decisions by the United States District Courts in Nevada and Arizona, against attacks substantially the same as that made by the appellants here, the courts have sustained the requirement for a showing of present marketability and cited *Foster v. Seaton*, *supra*. The cases are as follows, the departmental decision attacked in each being given after the case citation:

*The Dredge Corporation v. E. J. Palmer et al.*, Civil No. 366, D.C. Nevada, decided September 25, 1962; appeal pending (*Clear Gravel Enterprises, Inc., et al.*, A-27967, A-27970 (December 29, 1959)).

*The Dredge Corporation v. J. Russell Penny et al.*, Civil No. 396, D.C. Nevada, decided September 25, 1962; appeal pending (*United States v. The Dredge Corporation*, A-28022 (December 18, 1959)).

*Shuck v. Helmandollar*, Civil No. 682-Prescott, D.C. Arizona, decided December 7, 1961; no appeal taken (*United States v. Thomas R. Shuck et al.*, A-27965 (February 2, 1960)).

*Mulkern v. Hammitt*, Civil No. 299, D.C. Nevada, decided February 19, 1963 (*United States v. G.C. (Tom) Mulkern*, A-27746 (January 19, 1959)).

preponderance of the evidence after the Government had made out a prima facie case in favor of their invalidity. In *Ickes v. Underwood*, *supra*, a case in which the Bureau of Land Management contested a mining claim located for sand and gravel, at pages 548 and 549, the court said:

\* \* \* The Government may dispense its bounty on such terms as it sees fit; \* \* \*

Appellees would bring themselves within the compass of public land cases, in which the applicants occupied contract relationships with the Government, such as the case of *Payne v. Central Pacific Railway Company* [255 U.S. 228, 41 S. Ct. 314, 65 L. Ed. 598 (1921)]. There the Railway Company had accepted an offer made by the Government; had constructed agreed units of railroad; had made required selection of indemnity lands, all in conformity with the statutory requirements. It was under those circumstances that the Supreme Court said: "The railroad then had been constructed and equipped as required by the granting act and nothing remained to be done by the grantee or its successor to fulfill the conditions of the grant and perfect the right to a patent. The rule applicable in such a situation is that 'a person who complies with all the requisites necessary to entitle him to a patent for a particular lot or tract is to be regarded as the equitable owner thereof' [at page 237 of 255 U.S.] \* \* \* (Italics supplied.) In that case the Court pointed out in express terms the fact which distinguishes it from the present case, i.e., 'Rightly speaking, the selection is not to be likened to the initial step of one who wishes to obtain the title to public land by future compliance with the law, but rather to the concluding step of one who by full compliance has earned the right to receive the title.' [At pages 234, 235 of 255 U.S.] Here, appellees [who claimed only location of their mining claim] have merely taken the initial steps in seeking to secure a gratuity from the Government. They are in no position to compel action, or to coerce the executive in the exercise of its discretion."

As the court observed in *Foster v. Seaton*, *supra*, as to holders of unpatented contested mining claims:

\* \* \* The short answer to appellants' objection is that they, and not the Government, are the true proponents of a rule or order; namely a ruling that they have complied with the applicable mining laws. \* \* \* Until he has fully met the statutory requirements, title to the land remains in the United States. *Teller v. United States*, 8 Cir., 1901, 113 F. 273, 281. Were the rule otherwise anyone could enter upon the public domain and ultimately obtain title unless the Government undertook the affirmative burden of proving that no valuable deposit existed. We do not think that Congress intended to place this burden on the Secretary. 271 F. 2d at 838.

Since the claimants' contention that a showing of commercial ore was required is predicated upon their opposition to the testimony given at the hearing which tended to show that a reasonably prudent man would not be justified in the further expenditure of labor and means with a reasonable prospect of success in developing a valuable mine, it is not necessary to consider this contention beyond the observation that no such requirement was made.

Because of the absence of a showing of discovery before July 23, 1955, on the three claims and because of the subsequent date of the lo-

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cation of the two claims, their entire case depends upon a determination whether the stone and the clay found on the claims are common varieties within the meaning of section 3 of the act of July 23, 1955. The evidence on this point has been carefully examined. Such examination discloses that stones composed of crystalline quartz referred to as Jasperized agate or agatized Jasper have been unearthed singly by digging on the claims. The claimants base their case upon the assertion that this stone is very beautiful; that it looks like marble when it is polished and that it can be used for facings on buildings and decorative stone around fireplaces and for landscaping purposes. They showed some sales, approximating 400 tons from 1956 through 1958, for amounts ranging from \$44 to \$186. But all of this tends to show nothing more than a limited use as building stone which, the Department has held consistently, is not indicative of an uncommon variety of stone. *United States v. J. R. Henderson*, 68 I.D. 26 (1961); *United States v. D. G. Ligier et al.*, A-29011 (October 8, 1962). However, their best customer was a rock dealer who has an interest in other claims in which Shannon also has interests. The Government witness took samples to 15 other rock dealers all of whom indicated that they were not interested in purchasing any of such stone.

The claimants showed sales of two loads of clay material for mixing in stone plaster in January 1958. The purchaser, who is their best rock purchaser, testified that he purchased 12 tons of clay in January 1958, and sold it to a plastering contractor (Tr. 281-282). He added: "Frankly, I don't know whether it was good or bad, because he didn't ask for more." (Tr. 282.)

The chemical tests on samples taken by the Government's witness show that it is not suitable for an oil-bleaching material or as an absorbent; that it is not naturally absorbent and does not become sufficiently so even with acid treatment so that there is very little chance that it could be used as a catalytic agent (Tr. 85, 91). Furthermore, it is a calcium clay, rather than a sodium clay, and for that reason is not nearly so suitable for industrial purposes (Tr. 93, Exhibit D).

In the light of this evidence, it is quite clear that the clay cannot be regarded as an uncommon variety because it has some property giving it distinct and special value. Of like import is *United States v. Mary A. Matthey*, 67 I.D. 63 (1960), and cases cited therein.

Thus I conclude that the claimants have failed to show a discovery on any of the claims which would exempt these claims from the application of the act of July 23, 1955, or to show that any of the claims is exempt from the application of this act because there is a discovery of an uncommon variety of stone or clay. The hearing examiner and the Division of Appeals properly found the claims to be null and void with-

out usurping the function of the Congress or disregarding any of the claimants' evidence.

In their brief on appeal the appellants incorporated a motion to dismiss the contests. The motion is based on the same grounds as the appeal.

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 and the motion to dismiss is denied.

ERNEST F. HOM,  
*Assistant Solicitor.*

### ESTATE OF MARY RAMONA DISERLY YOUPEE BROWN

IA-1294

*Decided April 15, 1963*

#### Indian Lands: Descent and Distribution: Claims Against Estates—Rules of Practice: Generally

An Indian's written authorization for payment of her funds to a creditor, which has been filed with the Bureau of Indian Affairs during the lifetime of the Indian and not revoked by the Indian or disapproved by the Bureau, need not be resubmitted by the creditor as the basis for a claim against the estate of the Indian after her death; and the authorization so filed removes it from the application of the probate regulation which prohibits the filing of claims against Indian estates after the conclusion of the probate hearing.

#### APPEAL FROM A DECISION BY AN EXAMINER OF INHERITANCE

Lizzie S. Manning, an Indian, appealed to the Secretary of the Interior from a decision by an Examiner of Inheritance, dated February 2, 1962, denying her petition for a rehearing in the matter of the estate of Mary Ramona Diserly Youpee Brown, deceased Fort Peck allottee No. 3170. The appellant had filed her petition for rehearing because of the Examiner's decision of December 11, 1961, wherein appellant's interest in this matter was handled by the Examiner in the following manner:

The claim of Lizzie S. Manning or Lizzie Smith Manning, Ft. Peck allottee #885, for money loaned, is hereby disallowed for the reason that the said claim was filed after conclusion of the hearing, was not supported by an affidavit, and was otherwise insufficient in form.

In his decision denying the petition for rehearing the Examiner did not purport to touch the merits of the alleged claim, but merely cited the following provision in the Departmental probate regulations as barring him from considering the matter: