

UNITED STATES

v.

L. N. BASICH

SEP 23 1964

A-30017

Decided

Mining Claims: Common Varieties of Minerals

It is proper to declare invalid a mining claim which contains a mixture of two of the minerals withdrawn from mining location by section 3 of the act of July 23, 1955, since the mixture of the two withdrawn minerals does not create a new substance which is not withdrawn.

Mining Claims: Common Varieties of Minerals

Where a mining claim contains common varieties of sand and gravel and only slight values of gold and silver, the claim is valid only if the gold or silver is found in such quantity and such quality as to constitute a discovery which is independent of the sand and gravel.

Mining Claims: Common Varieties of Minerals

Sand and gravel which may be superior to other deposits of sand and gravel because of hardness, soundness, stability, favorable gradation, nonreactivity and nonhydrophilic qualities, and which can be processed and marketed more advantageously but which are suitable and have been used only for the same purposes as other deposits of sand and gravel in the vicinity are common varieties of minerals and not locatable under the mining laws because the special characteristics shown do not give the materials a special, distinct value.

Mining Claims: Common Varieties of Minerals

A mining claim is properly held invalid because the sand and gravel for which it was located are common varieties not subject to location even though such action prevents disposal of small quantities of gold and silver found with the sand and gravel.

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UNITED STATES  
DEPARTMENT OF THE INTERIOR  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C. 20240

A-30017

United States  
v.  
L. N. Basich

: California Contests  
: Nos. 6894, 6895, 6896  
  
: Mining claims held null  
: and void in whole or in  
: part  
  
: Affirmed

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

L. N. Basich has appealed to the Secretary of the Interior from a decision dated March 6, 1963, of the Assistant Director of the Bureau of Land Management which affirmed a decision of a hearing examiner declaring void ab initio all of the Hey Girl and portions of the Toby Ann and Nancy Vee mining claims because they were located on land title to which had passed to the State of California under the school grants and declaring null and void the remainder of the Toby Ann and Nancy Vee claims and all of the Suzie Wu, Hey Boy, and Krazy Kat claims, all in Imperial County, California, on the ground that no discovery of a valuable mineral deposit had been made within the limits of the claims.

The claims were located in May and September 1959. The Bureau of Land Management brought a contest against them, charging (1) that the material found within the limits of the claims is not a valuable mineral deposit under section 3 of the act of July 23, 1955, 69 Stat. 368, 30 U.S.C. § 611 (1958), which provides that a deposit of common varieties of sand, stone, gravel, and certain other minerals

"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 \* \* \*",

and (2) that a discovery of valuable minerals had not been made within the limits of the claims.

A hearing was held at which the contestee appeared and cross-examined the contestant's only witness but refrained from presenting any evidence in his own behalf on the ground that everything he wanted to bring out had been included in the testimony of the contestant's witness.

Later, he was allowed to reopen the hearing for the purpose of presenting the testimony of a mining engineer in his behalf. At the reopened hearing on March 24, 1961, the contestee's witness described a visit to the claims, the taking of samples, their assay for gold and silver values, and his opinions on the feasibility of operating a small plant to salvage gold and silver by amalgamation as an incident of the removal, processing, and sale of sand and gravel for road construction purposes. He presented an assay report showing an average combined gold and silver value, from five samples taken in sand and gravel (Exhibit C, Tr. 51)<sup>1/</sup>, of 33 cents per ton of sand and gravel or 66 cents per cubic yard (Tr. 51).

The contestee also testified that he removed approximately 96,000 tons of material from the claims within a 6-month period in 1959 (Tr. 63-64, 73). This was sand and gravel which were used as road base and bituminous aggregates (Tr. 74). Of the 96,000 tons, perhaps 100 to 200 tons of three-quarter rock were used in concrete (Tr. 74). He said the sand and gravel deposits on these claims are more valuable than any other material within the economical haul distance in Imperial Valley because of accessibility to the use areas, ease of excavation and processing, the physical properties of the materials, adequate reserves, and proximity to a present active market (Tr. 71). He also described the processing plant he proposed to operate on the claims, first washing the material and screening out the coarser rock with a No. 8 or 10 mesh for sale as aggregate (Tr. 75, 76), grinding the screened material and separating the gold and silver by running it over amalgamation plates, and selling the tailings as filler for an asphalt plant (Tr. 76). He thought the milling costs would not run over 10 cents per ton (Tr. 77) and said he understood that the amalgamation process would recover 85 percent to 90 percent of the gold and 65 percent of the silver in the gravel (Tr. 83).

The contestee contends on appeal that his claims are not invalid although they were located in 1959 for materials withdrawn

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

from mineral location in 1955 for four different reasons. First, section 3 of the act of July 23, 1955, withdraws sand and also withdraws gravel from location under the mining laws but does not withdraw a mixture of sand and gravel such as occurs on his claims. Second, even if sand and gravel mixtures were covered by the act, the withdrawal would nevertheless be inapplicable to his claims because it is expressly inapplicable to the withdrawn minerals that occur in or in association with some other mineral. Third, even if there were no gold and silver on his claims, the withdrawal would be inapplicable because it excludes from the common varieties of withdrawn minerals a deposit which is valuable because of "some property giving it distinct and special value". Fourth, because section 1 of the act gives the Secretary of the Interior authority to dispose of the common varieties of minerals that are withdrawn under section 3, and other minerals if their disposal is not otherwise expressly authorized by law, he has no authority to dispose of common varieties of sand and gravel found on these claims under section 1 of the act of July 23, 1955, because such disposal would also include disposal of gold and silver which he cannot dispose of because both gold and silver may be removed from public land under the mining laws.

None of these contentions can be accepted.

It may be conceded that the list of minerals withdrawn from location designates sand and gravel singly and not in combination but the fact of their combination in a deposit found on a claim does not, as the contestee asserts, create a new substance separate and distinct from its two component parts. The sand is still sand and the gravel is still gravel when they are mixed and both are still unavailable for location under the mining laws.

The proviso of section 3 of the act of July 23, 1955, states clearly

"That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit [of a common variety of sand, stone, etc.]."

The contestee has shown that there is some gold and silver in the claims, but he has failed to show that he is entitled to remove sand and gravel from the claims as an incident of the extraction of the gold and silver because he failed to show a discovery of gold and silver as required by the proviso upon which he relies. The Department and the courts consistently hold that a

discovery of a valuable mineral deposit is shown by evidence of such 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. Foster v. Seaton, 271 F. 2d 836, 838 (D.C. Cir. 1959). The contestee's own witness refused to concede that a prudent man would spend further time trying to develop a gold and silver mine. He said:

"He'd probably lose his shirt. He's got to have the sand and gravel in order to get the gold and silver." (Tr. 56.)

The legislative history of the act of July 23, 1955, affords no comfort for the appellant to sustain him in the contention that the finding of meager values of gold and silver which are insufficient to constitute an independent discovery of these minerals is sufficient to take the sand and gravel on the claims out of the category of common varieties which are withdrawn from location. The report of the Senate Committee on Interior and Insular Affairs, on the companion Senate bill (S. 1713) for which H.R. 5891 was substituted, states that the proviso was incorporated in the bill

"to make clear the committee intent to not preclude mining locations based on discovery of some mineral other than a common variety of sand, stone, etc., occurring in such materials, for example, a mining location based on a discovery of gold in sand or gravel." (S. Rept. No. 554, 84th Cong., 1st Sess. 8; emphasis supplied.)

And in United States v. Thomas R. Shuck et al., A-27965 (February 2, 1960), the Department held null and void mining claims located for sand and gravel when the evidence showed no discovery before withdrawal of the land for reclamation purposes. The decision noted that the claimants had shown some gold values and had indicated a hope of increasing their return from the sand and gravel by recovery of gold from concentrates extracted from the gravel in the course of the processing necessary to prepare it for sale and concluded that this did not meet the test required for a discovery of gold which would validate the mining claims independently of the sand and gravel. The departmental decision was affirmed in Shuck et al. v. Helmandollar et al. in the United States District Court for the District of Arizona (Civil No. 682-Prescott) on December 7, 1961. In its decision, sustaining the defendant's motion for summary judgment and dismissing the plaintiff's complaint, the court said:

"The court holds that the findings made by the Secretary of the Interior in his decision of February 2, 1960

were supported by substantial evidence and that the Secretary applied the proper standard in determining the validity of the claims involved."

The contestee's claim of "distinct and special value" upon which he relies to take sand and gravel found on his claims out of the category of common varieties that are withdrawn from location is based, in the main, on circumstances which give him some advantage over his competitors in processing and selling these materials. The "physical properties" which he also listed at page 71 of the transcript are described in his proposed findings of fact submitted to the hearing examiner as "hardness, soundness, stability, favorable gradation, non-reactivity, hydrophobia, and non-plasticity". In all of this, he seems to say that the materials on his claims are of better quality than other deposits outside of the claims, but he does not deny that the sand and gravel on his claims are used for exactly the same purposes as other sand and gravel produced in the area. The Department has consistently held that materials of superior quality which can be produced advantageously but which are used only for the same purposes as other less desirable deposits of the same materials are common varieties of material and are not locatable under the mining laws since these advantages do not give them a special, distinct value. United States v. J. R. Henderson, 68 I.D. 26, 29-30 (1961); United States v. D. G. Ligier et al., A-29011 (October 8, 1962); United States v. Kelly Shannon et al., 70 I.D. 136, 141 (1963); United States v. J. R. Cardwell and Frances H. Smart, A-29819 (March 11, 1964); United States v. R. R. Hensler, Sr., et al., A-29973 (May 14, 1964); United States v. Kenneth McClarty, 71 I.D. \_\_\_ (A-29821, August 27, 1964).

Having reached the conclusion that the Secretary of the Interior cannot dispose of common varieties of sand and gravel found on his claims because of his want of authority to dispose of the gold and silver which occur therein, the contestee concludes that the sand and gravel must, therefore, be regarded as uncommon varieties to avoid the undesirable result that the gold and silver must remain forever in the land. It is not necessary to suppose that the Secretary lacks authority to dispose of sand and gravel which happen to be mixed with small quantities of gold and silver which cannot feasibly be extracted in an independent operation. But, if this were true, it would not compel the alternate conclusion that the contestee's mining claims are valid because the sand and gravel must, therefore, be regarded as not common varieties. It

is within the province of the Congress to forbid private rights in the extraction of substances in public lands and, at the same time, to withhold from the Secretary of the Interior authority to dispose of such substances.

The conclusion that all of the mining claims and portions of mining claims not void ab initio because they were located on land over which the United States has no jurisdiction are void because the sand and gravel found therein are not subject to mineral location and because there has been no discovery of gold or silver which will validate the claims is correct.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed.

  
Ernest F. Hom  
Assistant Solicitor  
Land Appeals