

*August 30, 1968***UNITED STATES *v.* HAROLD LADD PIERCÉ****A-30537***Decided August 30, 1968***Mining Claims: Common Varieties of Minerals**

A deposit of limestone cannot be characterized as a deposit of an uncommon variety of limestone when the claimant fails to show what particular quality or use of the limestone makes it an uncommon variety.

Mining Claims: Common Varieties of Minerals

Even if a deposit of limestone meets all other requirements necessary to constitute it an uncommon variety of stone it is not a valuable mineral deposit within the mining laws if the claimant cannot show that it is marketable at a profit.

Mining Claims: Contests

Where a Government contest is brought against a limestone placer mining claim located prior to July 23, 1955, charging that no discovery has been made because the minerals cannot be marketed at a profit and that an actual market has not been shown to exist, the charges cannot be properly construed as raising the issue of whether a valid discovery of a common variety of limestone had been made prior to July 23, 1955, where no evidence was offered on that issue at the hearing, where that issue was not adverted to by either party, and where the contestee asserts that he can prove that the deposits could have then been marketed at a profit; however, where the contestee's offer of proof is insufficient to show that the materials could have been marketed at a profit as of July 23, 1955, the case will not be remanded for a further hearing on this issue in the absence of an offer of meaningful proof.

Mining Claims: Determination of Validity

The rejection of a state indemnity selection for a tract of land for the reason that a field report shows that the land is in an "apparently valid" mining claim does not constitute a binding determination as to the validity of the claim or foreclosure a subsequent contest of the claim when the claimant later applies for a patent.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Harold Ladd Pierce has appealed to the Secretary of the Interior from a decision dated July 27, 1965, by the Chief, Office of Appeals and Hearings, Bureau of Land Management, which affirmed a decision of a hearing examiner declaring the P-1 Pierce placer mining claim null and void and the Millsite A mill site claim invalid and rejecting his application L.A. 0170645 seeking patents for them. The placer claim comprises the N $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 22, T. 3 S., R. 3 E., S.B.M., and the mill site the N $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 24, same township.

The appellant filed his patent application on July 17, 1961.

On January 21, 1963, the Riverside land office instituted proceedings against the claims, alleging in the complaint:

a. Mineral materials have not been found within the limits of the P-1 PIERCE Placer Mining Claim in sufficient quantities [sic] to constitute a valid discovery.

b. No discovery has been made within the limits of the P-1 PIERCE Placer Mining Claim because the mineral materials present cannot be marketed at a profit and it has not been shown that there exists an actual market for these materials.

c. The MILL SITE A claim has not been used or occupied for the purpose of mining, milling, beneficiation or other operation in connection with the P-1 PIERCE Placer Mining Claim.

A hearing was held on September 18 and 19, 1963, which covered both claims. In his subsequent decision of April 29, 1964, the hearing examiner held both claims invalid and rejected the application for patent. He found that the placer claim was located in 1948 for deposits of limestone and aplite, which are minerals of widespread occurrence; that there was no evidence that these deposits were marketable prior to the passage of the act of July 23, 1955, 30 U.S.C. sec. 601 *et seq.* (1964);¹ that consequently they were locatable only if the limestone and aplite were deposits other than a common variety within the meaning of that act; that the deposits, if "uncommon," must be shown to be currently marketable; and that present marketability is not established by showing marketability for uses which would not make the deposits an "uncommon variety." He therefore concluded that no discovery of a valuable mineral deposit had been made on the placer claim and declared it null and void. He then held the mill site claim null and void on the ground that the appellant had not shown any present occupation of it in connection with a placer claim.

On appeal, the Chief, Office of Appeals and Hearings, affirmed, holding that marketability was an issue at all times from the moment the placer claim was located; that after the United States had established a prima facie case, the burden of providing the validity of his claim was on the claimant; that the appellant had not offered any proof that the deposits on the claim were marketable in the past or now, but only the possibility of marketability based on future plans; that geological inference based on core drills in an adjoining patented claim was not a substitute for discovery of a valuable mineral deposit within the boundaries of appellant's claim; and that lack of development since 1948 was at least an indication that the appellant did not believe there was a present demand for the deposits on the claim. The placer claim associated with it being invalid, the decision went on, the mill site claim used in connection with it must also fall.

¹ Amended by the act of September 28, 1962, 76 Stat. 652, in details not material here.

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On appeal, the claimant alleges that the hearing examiner added an issue not included in the pleadings, *i.e.*, the marketability of the aplite and limestone prior to July 23, 1955, and that as a result, after concluding that marketability was not shown as of that date, the examiner considered the claim only on basis of an "uncommon variety" of mineral; that the hearing examiner found that there is a sufficient quantity of limestone on the claim and a market for it for use for roof rock, chicken feed, fillers, and road mix so that if marketability prior to July 23, 1955, is not in issue the appellant has met the burden of proof; that the time of marketability not having been made an issue in the contest complaint, the contestee had the right to assume that it was not an issue at the hearing; and that a prior Departmental decision had in effect established the validity of the placer claim. Appellant offers to prove that the deposit of limestone was marketable on and prior to July 23, 1955. He states that the limestone is not a "common variety" and that he can prove that it has a distinct and special use and economic value above the general run of such deposits. He also contends that while geological inference may not be sufficient evidence to establish a discovery, it is enough to prove the quantity and quality of a deposit and that lack of development of a deposit does not indicate lack of present demand for the material in the deposit.

The placer claim, it appears, was attacked on two grounds: first, that the limestone is a "common variety," and, second, that the appellant had not demonstrated that a market for it existed prior to July 23, 1955.

If the limestone is not a "common variety," the deposit remains subject to mineral location and the validity of the mining claim depends upon current conditions, not upon the issue of marketability at a profit prior to July 23, 1955.

Public land containing limestone was long open to mineral location if certain conditions were satisfied. In order to meet the requirements for discovery of a mineral deposit of widespread occurrence, such as limestone, it was necessary to show that the deposit was capable of being extracted, removed and marketed at a profit, that is, that it was marketable at a profit. This showing required a demonstration as to the accessibility of the deposit, bona fides in development, proximity to market and the existence of a present demand.²

²In *United States v. Coleman*, 390 U.S. 599 (1968), the court approved the Department's requirement that to qualify as a valuable mineral deposit building stone must be shown to be capable of being "extracted, removed and marketed at a profit." It declared the marketability test to be a proper criterion in the determination of whether a mineral deposit is valuable and to be a logical complement of the "prudent man test."

The mining laws were amended by the act of July 23, 1955, *supra*, to remove common varieties of stone and other minerals from the categories of valuable mineral deposits which could be located under the mining laws. Section 3 provides:

No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall 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: *Provided, however*, 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 deposit. "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. "Petrified wood" as used in this Act means agatized, opalized, petrified, or silicified wood, or any material formed by the replacement of wood by silica or other matter. 30 U.S.C. § 611 (1964).

The pertinent regulation adds:

"Common varieties" includes 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. Mineral materials which occur commonly shall not be deemed to be "common varieties" if a particular deposit has distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation. In the determination of commercial value, such factors may be considered as quality and quantity of the deposit, geographical location, proximity to market or point of utilization, accessibility to transportation, requirements for reasonable reserves consistent with usual industry practices to serve existing or proposed manufacturing, industrial, or processing facilities, and feasible methods for mining and removal of the material. Limestone suitable for use in the production of cement, metallurgical or chemical grade limestone, gypsum, and the like are not "common varieties." This subsection does not relieve a claimant from any requirements of the mining laws.

43 CFR 3511.1 (b)

It is not clear upon what basis appellant contends that the limestone on his claim is an uncommon variety. In the earlier proceedings and beginning with his application for patent he claimed that the limestone on the claim was predominantly suitable for use in manufacturing all types of cement. He also contended that it was suitable for roof rock and chick feed and that the fines from crushing it for various purposes could be used as a by-product as a filler for asphalt tile and paint. He said too that the limestone could be used to make hydraulic lime. He did not say directly, however, whether the suitability of the limestone for any particular use made it an uncommon variety. He only implied that limestone marketable as a chemical grade or for the making of

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cement is an uncommon variety and he suggested that limestone usable as roof rock and a filler for plastics and ceramics would be an uncommon variety (Brief on appeal to Director, pp. 20-21).

In his present appeal appellant says only that "the limestone used as fillers in the mastic tile industry requires definite chemical specifications and definite physical properties not commonly found and therefore a distinct and special use and economic value over and above the general run of such deposits" (Brief on appeal to Secretary, p. 8). He offers to prove this. He says nothing else concerning any other use so it appears that he may now be resting his uncommon variety argument solely upon the use of the limestone as a filler.

If this is so, his position is countered by his own evidence at the hearing. He talked then in terms of using fines as a by-product of crushing limestone for roof rock for filler purposes (Tr. 157, 165), and so did Clifford O. Fiedler, who recommended to a client company that it buy limestone from the claim for use as roof rock (Tr. 273). Appellant stated that a metallurgical grade limestone was not needed for that purpose (Tr. 219), and Fiedler said that limestone suitable for roof rock did not have to maintain a degree of chemical purity, only color and grain structure (Tr. 274). It follows that fines as a by-product of crushing for roof rock need no grade of chemical purity.

Appellant testified at the hearing that he believed that the claim had over 500,000 tons of limestone containing 98 percent calcium carbonate but that he had not been much concerned with that "because that is overdone. The market on that is limited" (Tr. 201). The contestant submitted evidence that a chemically pure limestone would contain higher than 97 percent calcium carbonate (Tr. 55) and that the limestone preferred for general chemical use was a rock running better than 99 percent (Tr. 86). While appellant produced an analysis of 10 samples from the claim showing that 5 samples had in excess of 97 percent calcium carbonate (Ex. 21), contestant's 3 samples showed only 81.0 percent, 92.44 percent, and 95.75 percent calcium carbonate (Ex. 26, 27, 28). There was also a conflict as to the uniformity of grade of the limestone deposit in the claim and as to the effect of intrusions or layers of aplite and other material on the extraction of high quality limestone. Thus, to the extent that the uncommon nature of the limestone deposit is deemed to rest upon the presence of chemical grade limestone, the appellant has not shown by a preponderance of the evidence that the limestone deposit has a distinct and special value by reason of the presence of some high grade limestone. Cf. *United States v. Frank Melluzzo et al.*, 70 I.D. 184 (1963).

Even though we assume that the deposit of limestone may be classified as an uncommon variety, the mining claim based upon it must satisfy the requirements of the mining law. One of these as we have seen, is that there must be a present profitable market for the deposit. It must be a market based either upon the use making the limestone an uncommon variety (*United States v. E. M. Johnson et al.*, A-30191 (April 2, 1965)) or upon the use of the limestone for the same purpose that a common variety of limestone would be used for, but in the latter event the limestone would have to possess a unique value for such use which would be reflected in a higher price for the limestone than a common variety would command (*United States v. U.S. Minerals Development Corporation*, 75 I.D. 127 (1968)). As the hearing examiner pointed out no showing has been made that limestone has been removed and marketed at a profit from the claim. The most the appellant has shown is that a market exists for the limestone principally for roof rock and other incidental uses for which a common variety of limestone could be used. At least, these are the only uses supported by any testimony other than appellant's.

Let us examine the evidence more closely.

In his application for a patent, dated July 13, 1961, appellant alleged that the limestone on the P-1 claim was valuable for four purposes:

1. Production of cement. Appellant said that his claim adjoined the Guiberson limestone claims to the north which were core-drilled to 500 feet in depth, with over 10,000,000 tons of limestone and aplite rock blocked out, for the purpose of appellant's locating a cement plant in 1946 for the Guiberson Whitewater Cement Company. Appellant said he proved the deposit to be commercially practical for the production of cement and that 14 types of cement were made in a model cement plant.

2. Use for slabs and facings. Appellant said 1,000 pounds of selected limestone in two-foot squares were shipped to a furniture company which cut and polished them as slabs for table, bathroom, and sink tops and fireplace facings. He said that as a result the company designed a cutting and polishing plant for location on property of the appellant to produce 1,000 square feet of polished marble a day under a budget of \$150,000 with an estimated profit of more than \$50,000 a year.

3. Use as filler. Appellant said a sample of 1,000 pounds had been shipped to the Fiedler Company in Los Angeles which manufactured a filler for floor tile use.

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4. Manufacture of hydraulic lime. Another 1,000-pound sample was processed by appellant and an acceptable hydraulic lime produced. The Durox Company tested the material and was willing to make a contract for 100 tons of silica feldspar sand and 40 tons per day of selected limestone for manufacturing hydraulic lime. Operations were held up because of incomplete financing of the Durox Company which had already spent more than \$1,000,000 in partially completing its plant in San Bernardino.

Subsequently, appellant submitted an affidavit dated May 1, 1962, supplementing his application for a patent. He said then that the material could be used for manufacturing cement, hydraulic lime, roof rock and chick feed, and filler for asphalt tile and paint. With respect to cement manufacture he attached reports or portions thereof made in 1947 and 1949 showing the suitability of the Guiberson deposit for making cement and the design of a plant for manufacturing 2,750 barrels of cement per day from that deposit. Cost estimates for the plant showed a profit in 1949 of 91 cents per barrel. Appellant estimated a profit in 1962 of \$1.13 per barrel.

Appellant then described plans for other products which, he said, had actually been made in pilot plants. He said installation of a crushing unit and a set of screens on the mill site or at San Bernardino would permit the sale of the following products at the following daily volumes and profits: limestone for hydraulic lime, 35 tons, \$157.50; roofing rock, 40 tons, \$20; chick feed, 10 tons, \$30; fines, 15 tons, \$45; a total of \$352.50 profit per day.

He said that as profits were made, additional plants could be built. He stated that a plant to make hydraulic lime would cost \$70,000 and would produce a profit of \$70,000 per year, operating at only 50 percent capacity for only 200 days.

Finally, he said that a plant for grinding limestone for use as a filler for tile and paints could be built for \$150,000 with an estimated daily profit of \$300 at 100 percent capacity.

After the contest was initiated, appellant asserted in his answer, filed on February 20, 1963, that he had 5,000,000 tons of cement rock on the P-1 claim suitable for various types of cement, that he was "presently negotiating a sale of the deposit for \$165,000," that he was offered 25 cents per ton in an agreement to take 1,200 tons per month for making hydraulic lime if he could guarantee title to the claim; and that in the crushing and screening of limestone "additional by-products" in roof rock, chick feed, and fines for asphalt tile could be sold for an average profit of \$3 per ton.

Later in a letter to the hearing examiner dated March 25, 1964, appellant attached a schedule of production using limestone and aplite from the P-1 claim to show that the materials could be profitably marketed. This schedule, however, also covered production from three other claims owned by Pierce which were the subject of a later contest, LA 0171256. Prepared by Fiedler it showed production from a projected \$200,000 plant using limestone and aplite from the P-1 claim and the same and other material from the 3 other claims involved in that contest. Net profits per month were shown as follows for the following items and tonnages: limestone roofing, \$8,344.88 (1,500 tons), sands, \$1,891.20 (400 tons), and fillers, \$1,891.20 (400 tons), and aplite crushed \$1,062.40 (800 tons) and filler, \$965.58 (200 tons), a total of \$14,155.26 per month.³

Then, on his appeal from the hearing examiner's decision, appellant submitted an affidavit dated June 19, 1964, by the president of the American Hydrocarbon Corporation stating that it owned land to the north and east of the P-1 claim, that a portion of the land was known as the Guiberson Limestone deposit, that the company was arranging financing for a \$20,000,000 cement plant to utilize the deposit, that when financing was arranged the company would be in a position to negotiate with appellant relative to his interest in the P-1 claim but that "its planned cement plant is not contingent upon such acquisition."

So much for documents filed in the case. Now let us consider the testimony and evidence submitted at the hearing. Pierce testified that he was the directing engineer for the Guiberson Whitewater Cement Co. from 1947 to 1951 (Tr. 149, 151), that a 4,500 barrel cement plant was designed for the Guiberson deposit (Tr. 153), that the RFC approved it for a \$3,500,000 loan, that such a plant could operate for 17 years on the estimated 6,000,000 tons of cement rock (limestone and aplite) on the P-1 claim (Tr. 154, 176) but that there were 40,000,000 tons when it was blocked out with 80 acres of the Guiberson deposit (Tr. 154).

He felt that more profitable products than cement could be made—roofing rock and filler—and that he could get \$5 per ton for use of the

³ One puzzling aspect of this production schedule is that it contains exactly the same figures as to costs, sales, profit, etc. as a production schedule prepared by Fiedler and introduced as an exhibit (Ex. V) in the later contest. However, the schedule submitted by Pierce here is typewritten whereas Exhibit V is handwritten. The puzzling aspect though is that the schedule here bears the notation that it covers not only the P-1 claim but also the three claims involved in the later contest whereas Fiedler indicated in the later contest that Exhibit V, which bore no notation, covered only the production from the two lode claims involved there. See the decision in that case, *United States v. Harold Ladd Pierce*, 75 I.D. 270 (A-30564), decided today, which will be referred to as the second *Pierce* case.

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limestone and aplite as road base (Tr. 157-158). In reference to roof rock he said he had negotiated with contractors to extract and move rock from the claim to the mill site or railroad for \$2 per ton at a 100 ton daily rate, that freight to Los Angeles would be \$2.20 per ton, that the selling price at Los Angeles was \$6 per ton and he was being offered a contract at that price on the basis of 30,000 tons per year, and that the only expense that he would incur would be \$5,000 for road work (Tr. 159-162).

On use of the limestone for hydraulic lime, appellant believed that when the Durox Co. straightened out its financing he would be able to supply the limestone at a cost of \$4.50 per ton on a 50-ton-a-day contract calling for a sale price of \$7 per ton (Tr. 162-164). However, in answer to the question whether "there [is] an existing demand for hydraulic lime," he replied that "[t]here has to be a developed market" (Tr. 163).

On use of the limestone as a filler for asphalt tile and paint, appellant testified that he had a company interested in contracting for 100 tons of material per day which it would sell to the roofing trade "for the aggregate size, and the fines would go to the tile floor tile business, which is in short supply now." He said the company figured it could make \$100,000 per year on 30,000 tons of material (Tr. 165).

In summation he said that he believed that he could make a profit on each product that he could produce and sell on the present market (Tr. 177).

On cross-examination appellant was asked to give the percentages of material that he would produce for the various products that he had mentioned. He gave a breakdown of 22,800 tons a year for roof rock (including chick feed), 6,000 tons a year for filler, and 6,000 tons a year "specialty ground," but then indicated the figures were for a plant to take care of roofing rock. His counsel objected that appellant had not said that he would produce all products at the same time (Tr. 212-215). Appellant said he had sold materials from the claim but primarily for test purposes; no sales were made before 1961 (Tr. 215-216). When asked whether his market was contingent upon the consummation of the contracts he had mentioned, he asked which of 4 pending contracts was meant but he stated that they were all contingent upon his securing title to the claim (Tr. 216-219).

Appellant mentioned that a loan of \$1,500,000 had been made by a bank for the Guiberson deposit (apparently at the time of the RFC loan), that that deposit had been sold "again" for a half million dol-

lars, and that he had been approached by the present owners of the deposit (American Hydrocarbon Corporation) to buy the P-1 claim when he acquired title (Tr. 239). He said that all his negotiations in connection with the claim were contingent upon his obtaining title (Tr. 251). When questioned whether any limestone had ever been removed and marketed from the Guiberson deposit, appellant said some had been shipped for testing purposes (Tr. 264).

Appellant's only witness, other than himself, was Fiedler. He testified that he was "presently" consultant to a company which purchased limestone for roof rock, that he had been consulted with reference to expanding facilities for producing the product and for the purpose of determining another source of raw material, that he had decided, on the basis of visiting the P-1 claim and seeing tests, to recommend that limestone be purchased from that claim, that his company for the "present time" contemplated using in excess of 30,000 tons a year, and that he would recommend either a contract to pay appellant \$1 per ton royalty, \$1,000 per month minimum, with his client to do all the mining and transportation or to pay \$6 a ton for the material delivered in Los Angeles (Tr. 268-272).

If all the data and figures that appellant has submitted seem bewildering, it is because they are. Appellant has offered one proposal after another for disposing of materials from his claim and these proposals are separate from each other or overlap or intertwine. They are based in some instances on appellant's doing the mining and transportation and in others on prospective purchasers doing this work and paying appellant a royalty. On top of all this appellant indicates that he may simply sell the claim. What it all boils down to is that development of the P-1 claim and the production of materials from it are matters of conjecture and speculation. This is not to imply that the materials cannot be used for the purposes claimed and that tests as to quality and quantity have not been made. However, the conclusions that have been drawn by appellant have not been tested in the market place and it is difficult to avoid the impression that they are tinted with the rosy optimism of a promoter.

For example, appellant said in his affidavit of May 1, 1962, that a plant for making hydraulic lime would cost \$70,000 and would make a profit of \$70,000 per year operating at only 50 percent capacity for only 200 days. It would seem that investors for such a lucrative proposition would have to be fought off instead of depending on the Durox company to straighten out its shaky finances. Perhaps the answer lies in appellant's testimony that a market for hydraulic lime would have to

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be developed (Tr. 163) and the testimony of Edward F. Cruskie, mining engineer witness for the Government, that hydraulic lime "has been to a great extent superseded [sic] by the portland cement and it is relatively obsolete" (Tr. 275).

For another example, in his patent application appellant said that a furniture company, after testing his limestone, designed a plant to produce 1,000 square feet of polished marble a day under a budget of \$150,000. The estimated profit was \$50,000. Nothing more was said of this in the subsequent proceedings although the estimated profit seems handsome indeed.

For a final example, appellant testified that he had been offered a contract for 30,000 tons of roof rock per year delivered at a price of \$6 per ton in Los Angeles. Presumably this is the proposed sale to Fiedler's client. Appellant testified that he could contract to have the rock extracted and shipped to Los Angeles for \$4.20 per ton, thus realizing a profit of \$54,000 a year. His only cost would be a \$5,000 investment in roads.

As we have noted, appellant testified that he believed he could make a profit on every product that he could produce from his claim although he admitted that he had no definite plan as to whether products would be produced separately or concurrently or in various combinations. There has already been mentioned the conflict in the evidence as to the uniformity of grade of the limestone and as to the effect of the presence of aplite on the manufacture of cement (Tr. 34, 207-211, Ex. 38, D). There is also a dispute as to whether the limestone must be selectively mined by underground methods, which would greatly increase costs (Tr. 12, 123-125). However, the appellant leaves the indelible impression that he will be able to simply mine down the whole mountainside of limestone and aplite on his claim and, through blending and selecting, dispose of everything at a profit.

As to why these profitable operations or even some of them have not materialized since 1948, when the claim was located, appellant's answer has been that everything was contingent on his securing title. The impression sought to be created is that once a patent is issued, profitable mining operations to supply a waiting market will begin at once. This, however, is belied by the experience with the Guiberson deposit of which the P-1 claim actually appears to be a part, perhaps one-fifth. The 100 acres adjoining the P-1 claim to the north were patented on August 3, 1922. Yet nothing was done with the Guiberson deposit until 25 years later. Then, in the late 1940's, with appellant

as directing engineer of the Guiberson Whitewater Cement Co., an RFC loan was obtained for a cement plant but the remaining private financing fell through. Although the property has been sold, as late as 1964, the present owner, the American Hydrocarbon Corporation, was attempting to arrange financing for a cement plant which, incidentally, was not contingent upon its purchase of the P-1 claim. We are led to wonder why, 42 years after the Guiberson deposit passed into private ownership, the profitable operations which appellant claims are practical certainties for the P-1 claim had not commenced on the Guiberson deposit, which has the same limestone on it and in far greater quantities and is even more favorably situated from the standpoint of proximity to the railroad. (It is on the side of the mountain facing the railroad whereas the P-1 claim is on the opposite side).

The market for use of the limestone from the claim in the production of cement is at best an uncertain one. Appellant would rely upon the general increase in the demand for cement, but he has not shown that he could reasonably expect to share in the market under the existing location of producing cement plants.⁴

We can draw only the conclusion that, at least to the time of the hearing in 1963, the market for limestone products had been adequately supplied by existing sources, that appellant might have entered the market to some extent but has not persuasively shown that he could have done so at a profit, and that on the contrary, the experience with the patented Guiberson deposit is more persuasive that prospects of profitable competition in the market were sufficiently doubtful so that investment money was not forthcoming for financing such an attempt.

Thus, appellant has fallen far short of showing by a preponderance of credible evidence that he has a valid claim for a valuable deposit of limestone under the mining law even assuming that it is an uncommon variety.

We now turn to the contention that the issue of marketability of the deposit as a common variety of limestone prior to July 23, 1955, was not properly raised by the pleadings and its corollary that the United States did not present any evidence on that point, even if it were an issue.

Three years ago the Department examined similar objections to

⁴The economics of the industry require that plants ordinarily be located near a supply of limestone. Bureau of Mines, Bulletin 630, "Mineral Facts and Problems, Cement," p. 193 (1965 ed.). Cf. *United States v. Robert E. Anderson, Jr. et al.*, 74 I.D. 292 (1967).

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a contest complaint brought against several sand and gravel claims.⁵ The charges were essentially identical to those against the P-1 Pierce placer and the appellant asserted that, as they were worded, the issue of discovery prior to July 23, 1955, was outside the scope of the pleadings. While the Department agreed that the charges could have been more accurately worded, it said that there was nothing to show that the appellant was unaware of the essential nature of the charges, that he was presumed to know the law, and that the validity of the claim could not be established simply by proof that a valid discovery of a common variety of mineral existed on April 11, 1962, the date of the complaint. The decision then pointed out that at the hearing the Government had asserted that it was its position that a discovery of a common variety of mineral must be made prior to July 23, 1955, that the contestee had expressed neither surprise at nor disagreement with this assertion and that he had questioned witnesses concerning operations in 1955. It then held that the contestee had acquiesced in the understanding of the charge.

Moreover, the decision went on, since the contestee must prove discovery prior to July 23, 1955, to establish the validity of his claims, and since he did not allege that he was deprived of the opportunity to submit evidence on that issue or that he had any new evidence on it to produce at a new hearing, the Department could not conclude that the contestee was misled by the charges or that, if he were, he was prejudiced in any way.

The circumstances here are different from those in the *Humphries* case *supra*. The Government counsel did not point out at any time that a discovery of a common variety had to be made prior to July 23, 1955, the Government did not offer any evidence directed to the crucial date, and the contestee did not recognize the importance of the issue by examining or cross-examining witnesses on it. The importance of the time of discovery was apparently first adverted to by the hearing examiner in his decision. It does not appear to have been raised at all at the hearing.

Time of discovery is, of course, an essential part of a valid discovery of a "common variety" mineral, but a contestee need not establish the existence of all the requisites for a patent in a contest. It is enough that he meet the charges raised against his claim. For example, if there is no charge that he has not made the requisite expenditure for improvements, he need not offer testimony that he has. So here, the time

⁵ *United States v. Keith J. Humphries*, A-30239 (April 16, 1965).

of discovery not having been made an issue either in the charge or at the hearing, the claim cannot peremptorily be invalidated on the ground that the contestee has not proved that all the essentials of a valid discovery had been met prior to July 23, 1955.

It would appear in the circumstances that the case should be remanded for a further hearing in order to enable the appellant to submit evidence on the marketability of the limestone on the claim as of July 23, 1955. There is no point, however, in sending the case back unless the appellant has pertinent evidence to submit. The appellant claims that he can submit such evidence but let us analyze his offer of proof. In his appeal to the Director, appellant stated that his witness Fiedler was also a witness in a later hearing before the same hearing examiner in another case in which the attorneys and witnesses for both contestant and contestee in the immediate case were also present. Appellant stated that in the later case Fiedler testified that the markets for limestone used as roofing rock, chicken feed, and filler existed prior to July 23, 1955, and that the mineral from the area could have successfully competed in the market because of a favorable freight rate. Appellant therefore requested a rehearing.

In denying the request the Office of Appeals and Hearings simply said that appellant had not stated what further showing he could make and that he had not shown that he had been unable to present such evidence at the original hearing. Appellant disputes this statement, pointing out that he had referred to the evidence submitted in contest LA 0171256. He states specifically, however, that in that contest the examiner found that limestone found within $1\frac{1}{2}$ miles of the P-1 claim and owned by appellant could be sold as roof rock in Los Angeles for \$6 a ton at a cost of \$4.70 a ton and that this market existed on or before July 23, 1925. Appellant alleges that the same evidence can be shown to be applicable to the limestone deposit on the P-1 claim.

In the present case appellant has submitted voluminous evidence to prove the present marketability at a profit of the material on the P-1 claim. In effect, what he is offering to prove is that he can relate this evidence back to July 23, 1955, to show profitable marketability as of that date. This is essentially what he did in contest LA 0171256. The showing, however, will be of significance only if the evidence that he would relate back is persuasive of present marketability, for if the evidence does not establish marketability of the material at this time it is not likely, if it is related back, to show marketability as of July 23, 1955, unless critical factors have changed.

We have analyzed in detail the evidence submitted by appellant and

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concluded that it is insufficient to show marketability at a profit at the time of the hearing. It would follow that this or similar evidence would not, in the absence of other considerations be sufficient to show profitable marketability as of July 23, 1955, assuming such evidence could be related back. In this connection, it seems clear that one item of evidence strongly relied upon by appellant could almost certainly not be related back to 1955. This is the testimony of Fiedler as to his recommendation for a contract to purchase material for roof rock from the claim. It seems plain from Fiedler's testimony that his client company was only then (around 1963) planning to expand its facilities and was only then seeking an additional source of material. There is no indication that this situation obtained as of July 23, 1955.

As for the evidence presented in contest LA 0171256, we have held in the second *Pierce* case, *supra* decided today, *supra* fn. 3, that that evidence, coupled with the evidence submitted here, does not show marketability at a profit as of July 23, 1955, of the common variety of limestone on the claims involved in that case. Relating that evidence to the P-1 claim would therefore not help the appellant.

Granting a hearing to the appellant as a matter of right on the basis of the evidence which he offers to prove would therefore be a futile act. Consequently a further hearing will not be ordered in the absence of an offer of meaningful proof.

Only one further point need be mentioned at this time, that is, that the validity of the P-1 *Pierce* claim was not sustained in the Director's decision of April 16, 1951 (Ex. E), or in the Department's decision of March 6, 1951 (A-25971), to which it was a sequel. The Department's decision, which was concerned with the propriety of the rejection of a state indemnity selection for all of section 22, T. 3 S., R. 3 E., S.B.M., except the E $\frac{1}{2}$ NE $\frac{1}{4}$ and the NE $\frac{1}{4}$ SE $\frac{1}{4}$, did say that field examinations showed that the N $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ was included "in an apparently valid placer mining claim which was located for limestone" and rejected the State's application for that reason. However, the proceeding was not one between the United States and the mining claimant and the United States was not foreclosed from subsequently challenging the validity of the claim when appellant applied for a patent.

As for the Millsite A mill site claim, we believe that it was properly held invalid for the reasons given below.

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 of the Chief, Office of Appeals and Hearings, is affirmed as modified herein.

ERNEST F. HOM,
Assistant Solicitor.

UNITED STATES v. HAROLD LADD PIERCE

A-30564

Decided August 30, 1968

Mining Claims: Contests

The fact that a charge in a mining contest complaint may not adequately raise an issue does not vitiate a decision which rests upon that issue where the contestee examined and cross-examined witnesses on it, the record demonstrates that he was aware that the issue was important to the resolution of the contest, and he has not demonstrated that he has been prejudiced by the inartistic allegations of the complaint.

Mining Claims: Discovery

To satisfy the requirement that deposits of minerals of widespread occurrence be "marketable" it is not enough that they are capable of being sold but it must be shown that the mineral from the particular deposit could have been extracted, sold, and marketed at a profit.

Mining Claims: Common Varieties of Minerals

The Act of July 23, 1955, excludes from mining location only common varieties of the materials enumerated in the Act, *i.e.*, "sand, stone, gravel, pumice, pumicite, or cinders"; therefore, a material must fall within one of those categories before the issue of whether it is a common variety becomes pertinent.

Mining Claims: Common Varieties of Minerals

Where a stone containing mica can be ground and used as a whole rock for certain purposes, the issue may properly arise as to whether the particular stone is a common variety which is excluded from mining location by the act of July 23, 1955; but if the interest in the stone is simply for the mica to be extracted from the stone and value is claimed only for the mica, the issue presented is not whether the stone is a common variety of stone but whether the mica or feldspar constitute valuable minerals subject to location irrespective of the 1955 Act.

Mining Claims: Common Varieties of Minerals

Where a deposit of sand has an allegedly valuable mica and feldspar content, its locatability may depend upon either whether the sand is locatable as an uncommon variety of sand because of its mica and feldspar content or whether the mica or feldspar constitute valuable minerals subject to location as mica or feldspar.