

UNITED STATES

v.

CHAS. PFIZER & CO., INC.

A-31015

Decided DEC 29 1969

Mining Claims: Contests--Mining Claims: Common Varieties of Minerals

In a Government contest brought against a group of limestone placer mining claims located after July 23, 1955, on the charge that a discovery of a valuable mineral deposit has not been made within the limits of any of the claims, the charge is properly construed as raising the issue of whether or not the material found on the claims is a common variety of stone where it is clear that the mining claimant understood this issue to be one of the grounds for the contest prior to the commencement of the contest hearing, where a prehearing conference was granted for the express purpose of clarifying any question as to the meaning of the charge stated in the complaint, and where the claimant was prepared to and did submit evidence at the hearing on the issue.

Mining Claims: Common Varieties of Minerals

The common varieties of stone excluded from mining location by the act of July 23, 1955, are not restricted only to building stone.

Mining Claims: Common Varieties of Minerals

Limestone which contains at least 95 per cent of calcium carbonate and magnesium carbonate is a chemical or metallurgical grade limestone which remains locatable under the mining laws as an uncommon variety of stone.

Mining Claims: Common Varieties of Minerals

When limestone is claimed to be an uncommon variety because it is uniquely white in character, a finding to that effect cannot be made when it appears that there are varying degrees of whiteness and the evidence does not show which degree is unique.

### Mining Claims; Common Varieties of Minerals

Limestone which is crushed to some degree in its natural state is not to be deemed an uncommon variety of stone only for that reason where no value is added to the material in its use and the crushed condition merely lessens the cost of mining the stone and enables the producer to make a greater profit.

### Mining Claims: Discovery -- Mining Claims: Common Varieties of Minerals

Where a deposit of limestone consists of both an uncommon variety and a common variety, the validity of a mining claim located for the deposit after July 23, 1955, depends upon whether a valid discovery has been made only with respect to the uncommon variety; the determination must be made without any consideration of any value that the common variety may have.

### Rules of Practice: Hearings--Administrative Procedure Act: Hearings

Where a hearing examiner's decision contains a ruling, in a single sentence, on all of the proposed findings and conclusions submitted by a party to a hearing and the ruling on each finding and conclusion is clear, there is no requirement that the examiner rule separately as to each of the proposed findings and conclusions individually.



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

A-31015

United States

v.

Chas. Pfizer & Co., Inc.

: Contest No. 0154245 (Los Angeles)

: Patent application rejected  
: and placer mining claims  
: declared null and void

: Remanded

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Chas. Pfizer & Co., Inc., as successor to Anchor Minerals and Chemicals, Inc., formerly the Victorville Lime Rock Co., has appealed to the Secretary of the Interior from a decision dated May 29, 1968, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of a hearing examiner rejecting its application, Los Angeles 0154245, for patent to the Largo Vista Nos. 1 through 6 placer mining claims in sec. 19, T. 4 N., R. 8 W., S.B.M., Angeles National Forest, California, and declaring the claims to be null and void.

The record shows that appellant's predecessor, Victorville Lime Rock Co., filed its application for patent to the Largo Vista Nos. 1 through 8 mining claims <sup>1/</sup> on December 30, 1957, reciting therein, *inter alia*, that the claims were located on April 22, 1957, that the "entire deposit covered by the claims consists of limestone and is about 99 per cent calcium carbonate," and that the "lime rock in these claims is of such high purity that it is very adaptable for use in the chemical and metallurgical industries." The claimant further stated that the physical nature of the material on the claims is such that it is not suitable for building stone or roadworking purposes, the material being too soft for cutting or polishing or for use as riprap or building material.

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<sup>1/</sup> On June 4, 1963, subsequent to the hearing, appellant filed an amended patent application, excluding therefrom and abandoning the Largo Vista Nos. 7 and 8 mining claims in accordance with an agreement reached at the hearing (see Tr. 12-14). As a consequence, the lands embraced in those claims are not involved in the present controversy.

On October 3, 1961, at the request of the Forest Service, Department of Agriculture, a contest complaint was filed by the Government in the Los Angeles, California, land office in which it was charged that:

"1. A discovery of a valuable mineral deposit has not been made within the limits of any of the unpatented mining claims listed above.

2. The land within the claims is non-mineral in character within the meaning of the mining laws." 2/

A hearing was held on those charges at Los Angeles, California, on May 21, 22 and 23, 1963, 3/ at the outset of which the mining claimant requested, and was granted, a prehearing conference for the purpose of clarifying the issues in the proceeding (Tr. 5-43).

Appellant is engaged in the business of producing limestone products and, at the time of the hearing, operated two plants for that purpose at Victorville and at Lucerne Valley, California. The Largo Vista claims are 34 miles from appellant's Victorville plant and would be utilized in connection with the operations of that plant, which, at the time of the hearing, was supplied with material from the company's Victorville quarry, some 4½ miles from the plant (Tr. 266-268, 278-281, 306-309). In 1962 appellant's sales of limestone products reportedly amounted to approximately \$2,500,000, 4/ 80 per cent of which sales were in the Los Angeles area (Tr. 291-292). Approximately 30 per cent of appellant's product is sold to

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2/ A third charge, relating to failure to perform assessment work on the Largo Vista Nos. 7 and 8 claims, became moot when the appellant abandoned those claims.

3/ There is some question as to the exact dates on which the hearing was held. The title page of the hearing transcript shows that the hearing was held on May 21, 22 and 23, while the transcript itself indicates that the last day of the hearing was Friday, May 24, 1963 (Tr. 261-263).

4/ According to testimony given at the hearing, appellant had total sales in excess of \$2,000,000 in 1962, of which approximately \$2,500,000 was attributable to limestone products and the remainder to talc (Tr. 291-292). While it is not clear whether one of those figures is in error or appellant sustained a \$500,000 loss in its talc operation during the year, it would appear from the general tenor of the testimony that \$2,500,000 was the intended figure for limestone sales.

the floor tile industry, 30 percent for paint fillers and extenders, approximately 20 percent for use in the building industries (stucco, plaster, joint cement, putty and like items), while the remaining 20 percent is used in a variety of products ranging from asphalt filler to phonograph records (Tr. 282-286, 371-372; Ex. A).

The Government's efforts in this proceeding were directed primarily toward showing that the limestone deposits occurring on appellant's claims are common varieties of limestone which are not subject to location under the mining laws of the United States but are subject to disposition under the Materials Disposal Act of July 31, 1947, as amended, 30 U.S.C. §§ 601-604 (1964). <sup>5/</sup> The testimony of a witness for the Government was to the effect that the material on the claims is a common type of calcium-magnesium carbonate rock, varying in calcium carbonate content from 54 to 88 percent, interspersed with lenses or pods of extraneous material, such as granitics or metamorphics, and that it would be practically impossible to mine material from the claims in such a manner as to separate the carbonate material from the granitics (see Tr. 86-93, 106-107, 111, 136-137, 230-231).

Testimony of witnesses for the mining claimant, on the other hand, purported to show that the calcium carbonate content of the material to be processed in its plants is not a critical factor but that the total carbonate content (calcium and magnesium), the whiteness of the material and the absence of impurities are important, that the material on the Largo Vista claims is distinctive because of its high total carbonate content and whiteness, differing only in its calcium content from the material appellant is currently processing, that it can be mixed with the material from appellant's

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<sup>5/</sup> Section 3 of the act of July 23, 1955, as amended, 30 U.S.C. § 611 (1964), provides in pertinent part that:

"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 \* \* \*. '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 \* \* \*."

Although appellant's claims apparently embrace land included in mining claims located prior to July 23, 1955 (see Tr. 309-312), appellant does not assert rights based upon locations preceding those of April 22, 1957.

Victorville quarry without any problems, that white material is available on all six of the contested claims, that the carbonates on the claims can be successfully removed by selective mining, and that mining of these claims will be made easier and less expensive by virtue of the proximity of the claims to the San Andreas Fault and the resulting breaking up of the material to the extent that it is almost pre-crushed (see Tr. 284, 298-299, 302-307, 325, 332-334, 349-350, 452-453, 483-484).

From the evidence developed at the hearing the hearing examiner found, in a decision dated March 18, 1964, that the limestone deposits on the Largo Vista claims lack the special properties required for the manufacture of cement, that little, if any, of the material on the claims qualifies as a metallurgical or chemical grade limestone, and that the deposits do not possess a distinct, special or economic value for use over and above the general run of such material. He then concluded that the deposits on the claims "are of widespread occurrence", that they "do not meet any of the requirements necessary to remove them from the 'common variety of materials'", and that they therefore are not locatable under the mining laws of the United States.

In affirming the decision of the hearing examiner, the Office of Appeals and Hearings found, after observing that the Department had indicated that limestone may be classified as a "common variety" within the meaning of section 3 of the act of July 23, 1955, unless it has some distinct and special properties not generally found in limestone deposits, that, although the deposits on appellant's claims may have value in trade, manufacture, the sciences or mechanical arts, they do not possess a distinct, special economic value for such uses over and above the normal uses of the general run of limestone deposits. In view of the testimony given by the witnesses as to what they had observed, the Office of Appeals and Hearings attached no particular significance to the fact that the Government's mineral examiner may not have taken any mineral samples from the Largo Vista Nos. 2 and 4 claims, a point upon which appellant attempted to raise an issue in its appeal to the Director, Bureau of Land Management. 6/

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6/ We do not understand the basis for appellant's contention that no samples were taken on the Largo Vista No. 2. Exhibit 4 shows that two samples were taken on the claim and none on Largo Vista No. 1. Appellant has credited the two samples to Largo Vista No. 1.

Because of the appellant's subsequent abandonment of the Largo Vista No. 4, discussed later, and the inclusion of part of that claim in the amended location of the Largo Vista No. 3, which was sampled, the pertinence of the lack of sampling of the Largo Vista No. 4 is now largely moot.

At the outset of the hearing appellant challenged the sufficiency of the contest complaint to raise the issue of whether or not the material on the Largo Vista claims is a common variety of stone. Again, in its present appeal, appellant charges that the Department's regulations, which require that a contest complaint contain a statement in clear and concise language of the facts constituting the grounds of contest (43 CFR 1852.1-4(a)(4)) and which provide that any issue not raised, which could have been raised, by a private contestant shall be deemed to have been waived (43 CFR 1852.1-4(e)), were ignored in this proceeding. In support of its argument appellant cites the Bureau's Instruction Memo No. M-18 of November 1, 1962 (Ex. X), which states that:

"\* \* \* If the Government believes a mining claim to be void by reason of having been located for a common variety of a mineral enumerated in section 3, a contest proceeding would be the correct forum for a determination of that fact. The contest complaint should explicitly charge that the mineral deposit is a common variety within the purview of the law. The mining claimant will be afforded an opportunity to demonstrate the 'property giving it distinct and special value.'"

Appellant also attacks generally the Bureau's conclusion that the mineral deposits on the Largo Vista claims are of a common variety of stone. "The Director," appellant asserts, "applied the use test, which is contrary to law, and ignored other parts of the common varieties regulation," and he "apparently overlooked and misquoted evidence, and ignored the chemical and physical properties of the deposits and the admitted values of such properties, and therefore of the mineral, in use in an established industry and market."

The question of the sufficiency of the contest complaint was extensively aired at the prehearing conference granted for the express purpose of resolving any question as to the meaning of the charges of the complaint (Tr. 17-35), and we find appellant's attempt to revive the issue at this time to be without merit.

Aside from the question whether the charges in the complaint were literally sufficient to include a charge that the mineral deposits are a common variety, we think it is sufficient to note, first, that the Bureau instruction quoted above was issued more than a year after the complaint was filed in this case.

Second, and more important, the record clearly establishes that appellant was fully aware of the "common varieties" issue well in advance of the prehearing conference, appellant having stated in a "Motion to Assume Supervisory Jurisdiction", which was filed in the office of the Secretary in February 1962 and later withdrawn, that:

"\* \* \* Victorville is informed and believes that the Forest Service has initiated the contest on the ground that the Victorville Limestone deposit is one of the 'common varieties' of minerals within the meaning of Section 3 of P. L. 167 (30 U.S.C. 611), and was not subject to location as a mining claim on December 30, 1957. \* \* \*"

Obviously, appellant was fully cognizant that the issue of "common varieties" was raised and appellant was not prejudiced in any manner by the statement of the charges. It was not taken by surprise at the hearing and was fully prepared to and did submit evidence to show that the limestone on its claims was an uncommon variety. Consequently the contention now that the complaint was deficient in raising the common varieties issue has no merit.

Two basic substantive issues are raised by this appeal. The first is whether or not the Largo Vista claims have been shown to contain material which is locatable under the mining laws, i.e., material which is not a common variety of stone. The second question, assuming the answer to the first to be in the affirmative, is whether the deposits on the claims constitute valuable deposits of such material within the scope of the mining laws, that is, whether they meet the test of discovery.

Although the hearing examiner's decision in this case turned upon the question of the locatability of the material on appellant's claims, a showing of marketability of the material is as indispensable, if appellant is to prevail, as the establishment of the fact that the material is not a common variety of stone. 7/ That is, if the material

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7/ While a showing of economic value is an indispensable element in demonstrating the validity of any mining claim, economic value, per se, is not determinative of what constitutes a common or uncommon variety of mineral. That is, a determination that a particular deposit consists of a common variety of mineral does not necessarily connote the absence of economic value, and proof that a mineral deposit can be mined and marketed at a profit does not, ipso facto, remove that deposit from the

on the claims is not a common variety of stone, it must be shown that there is a present profitable market for the material. See United States v. Coleman, 390 U.S. 599 (1968); Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959); United States v. Harold Ladd Pierce, 75 I.D. 255 (1968); United States v. Harold Ladd Pierce, *id.* 270; United States v. Warren E. Wurts and James E. Harmon, 76 I.D. 6 (1969).

On the issue of common varieties, in attacking the decisions of the hearing examiner and of the Office of Appeals and Hearings, appellant contends that the term "common varieties" of "stone", as used in the 1955 act, was intended to mean common varieties of building stone and should not be construed to mean more. "Common stone which is not building stone and is not a valuable mineral deposit," appellant asserts, "has never been locatable under the mining laws." Inasmuch as it has not been alleged that the material on the Largo Vista claims was located or desired, or is suitable, for building stone purposes, appellant argues, it was error to hold it to be a "common variety" of "stone" within the meaning of the act. Assuming, nevertheless, that "stone", as used in the act, means more than building stone, appellant further argues, the material on the claims falls within the categories of stone expressly excluded from "common varieties" by the act because of properties giving it a distinct and special value.

It is interesting to note that appellant's contention that the 1955 act applies only to building stone is exactly opposite to the ruling by the United States Court of Appeals for the Ninth Circuit in Coleman v. United States, 363 F. 2d 190 (1966), that building stone could not per se be a "common variety" of stone under the 1955 act, a ruling that was subsequently reversed by the Supreme Court in United States v. Coleman, *supra*. The Supreme Court, however, did not go to the other extreme and hold that the 1955 act applies only to building stone. The court said only that the legislative history made it clear that the act "was intended to remove common types of sand, gravel, and stone from the coverage of the mining laws \* \* \*." 390 U.S. at 604. We do not believe that the generic term "stone" in the statute can be given a restricted meaning as the Ninth Circuit attempted and as appellant attempts here.

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Footnote 7 continued:

category of "common varieties". See United States v. Mary A. Matthey, 67 I.D. 63 (1960); United States v. E. M. Johnson et al., A-30191 (April 2, 1965); United States v. Gene DeZan et al., A-30515 (July 1, 1968). If the mineral is a common variety, so far as its locatability after July 23, 1955, is concerned, its marketability is immaterial.

Turning then to the question as to what is a "common variety" of stone, we find that the statute does not affirmatively define the term but provides negatively that the term "does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value \* \* \*." (Fn. 5, *supra*.) The only clues to the meaning of this provision are to be found in the statements of the Congressional committees considering the legislation. The House Committee on Interior and Insular Affairs stated merely that this language "would exclude materials such as limestone, gypsum, etc., commercially valuable because of 'distinct and special' properties." H.R. Rept. No. 730, 84th Cong., 1st Sess. 9 (1955). The Senate Committee on Interior and Insular Affairs stated more explicitly that the "language is intended to exclude from disposal under the Materials Act materials that are commercially valuable because of 'distinct and special' properties, such as, for example, limestone suitable for use in the production of cement, metallurgical or chemical-grade limestone, gypsum, and the like." S. Rept. No. 554, 84th Cong., 1st Sess. 8 (1955).

The language used by the Senate Committee served as a basis for the Department's regulation implementing the statute, which provides that:

"'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.'" 43 CFR 3511.1(b); emphasis added.

Limestone is, without question, a mineral of very widespread occurrence. Approximately 15 per cent of the United States, according to testimony given at the hearing, is underlain by limestone or carbonate rock, and about 70 per cent of all crushed stone used in the United States is made from such materials (Tr. 128; Exs. 11, 13). 8/ The Department has held that limestone is included within the meaning of the term "stone", as it is used in the 1955 act, and that a deposit of limestone is a common variety of stone within the meaning of the act if the material found therein does not satisfy the criteria of the statute and the regulation for exclusion from the category of "common varieties". See, e.g., Solicitor's opinion M-36619 (Supp.) (October 5, 1961); United States v. E. M. Johnson et al., supra, fn. 7; United States v. Harold Ladd Pierce, supra (75 I.D. 255 and 270).

Witnesses for the contestant stated that the material found on the Largo Vista claims is not suitable for use in the manufacture of cement because of its high magnesium content (Tr. 137, 229-230), and appellant makes no claim that it could be utilized for that purpose (see Tr. 421-422). In fact, appellant attempted to distinguish the Largo Vista deposits from other limestone deposits in the vicinity of Victorville by testimony that most of the limestone found in that area is of the type used in making cement and is not suitable for appellant's use (Tr. 352-353).

With respect to the question of whether the material found on the claims is metallurgical or chemical grade limestone, the testimony of witnesses for the respective parties was conflicting, both in the conclusions reached by the witnesses and in the understanding of the meaning of the terms "metallurgical" and "chemical" grade limestone exhibited by the witnesses.

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8/ In a strict sense, the term "limestone" is used in reference to rock composed almost entirely of calcium carbonate, while material with 10 per cent or more of magnesium carbonate present is called "magnesian" or "dolomitic" limestone, and material with a magnesium carbonate content approaching 45 percent and a calcium carbonate content around 55 per cent is known as "dolomite". In a broader sense, the term "limestone" is used to denote the entire spectrum of carbonate rock ranging from theoretically pure calcite (calcium carbonate) to dolomite (Exs. 12, 13, 18). It was in the broader sense that witnesses for both parties used the term "limestone" in their testimony at the hearing (Tr. 128-136, 271-272, 440-441).

William L. Johnson, a mining engineer employed by the Forest Service, stated that the friability of the material would make its use in metallurgy difficult and that it was his understanding that the industry prefers a high calcium carbonate stone, i.e., one containing at least 95 per cent calcium carbonate (Tr. 138-140). He stated that the chemical industry also preferred a material containing 95 percent calcium carbonate or more and that uniformity of the material was one of the most important requirements (Tr. 141-144). He did not believe that it was possible to take high-quality material with any degree of uniformity from the claims (Tr. 87-93, 144).

Donald Carlisle, associate professor of geology at the University of California at Los Angeles, testified, on behalf of the contestant, that metallurgical practice requires either a high calcium limestone or a high magnesium limestone, essentially a dolomite, but that in any case the chemical composition must be consistent from one day to the next. Controlling the mining and blending the materials so as to assure that consistency, he said, "would be essentially impossible on the Largo Vista claims" (Tr. 230-231). He similarly expressed the opinion that there is no large amount of chemical grade limestone on the claims, or material that could be blended to meet chemical specification, within his understanding of the term "chemical grade limestone", i.e., "grades of limestone which are superior to ordinary run of the mine limestone and can be used in industries which are uniquely chemical as opposed to industries, such as agriculture or road building where the chemical composition of the limestone is of lesser or of insignificant importance" (Tr. 231-236).

Although the witnesses for the Government agreed that the Largo Vista limestone deposits are composed of a common variety of limestone, both witnesses found some ambiguity in the terms which they were called upon to use in giving their opinions. Johnson stated that "metallurgical" or "chemical grade" limestone is "a difficult term to define" (Tr. 154). Carlisle stated that the "term chemical grade is not well-defined" (Tr. 234), and, in response to a question as to whether the term "chemical grade limestone" included, "in the common vernacular", calcium carbonates, magnesium carbonates and magnesian limestone, he said that "the term 'chemical grade limestone' is not in the common vernacular," that it "has sneaked into some of these laws and regulations by some route group that I don't understand," and that "high calcium limestone" is more commonly used (Tr. 246).

Appellant contended at the hearing, as it does now, that total carbonate content, which directly affects the amount of impurities present in rock, rather than calcium carbonate content alone, is determinative of whether or not a particular limestone deposit is chemical grade. Elmer A. Piercy, vice president and general manager of Anchor Minerals and Chemicals, Inc., testified that, in 85 to 90 per cent of the cases, customers are looking for a high carbonate content in the material which they use and are not concerned with the calcium-magnesium ratio and that he would classify all of the assay samples described in the report which accompanied appellant's patent application (Ex. D) as a chemical grade limestone (Tr. 302-304, 322-325).

In support of its position, appellant submitted in evidence a copy of the decision of the United States Court of Appeals for the Ninth Circuit in the case of Riddell v. Victorville Lime Rock Co., 292 F. 2d 427 (1961) (Ex. B), a case in which appellant was a party and which involved the interpretation of the terms "metallurgical grade" and "chemical grade" limestone, as used in section 114(b)(4)(A) of the Internal Revenue Code of 1939, as amended by the act of October 20, 1951, 65 Stat. 497.

That statute provided, in pertinent part, for depletion allowances at the following rates:

"(i) in the case of \* \* \* stone \* \* \* marble \* \* \* 5 per centum,

"(ii) in the case of \* \* \* dolomite, magnesite, \* \* \* calcium carbonates, and magnesium carbonates, 10 per centum,

"(iii) in the case of \* \* \* metallurgical grade limestone, chemical grade limestone, \* \* \* 15 per centum \* \* \*"

The court found in the Riddell case that the limestone there in question, which was from appellant's Victorville quarry, was a medium to coarse grained, crystalline, metamorphosed, friable limestone with an average calcium carbonate content of 99.30 per cent and an average silica content of .46 per cent, and that the calcium carbonate content of all limestone quarried by the taxpayer was never less than 98 per cent. Although it vacated a district court decision in favor of the taxpayer and remanded the case for

further proceedings, the court of appeals nevertheless sustained the district court's determination that the material at issue was chemical and metallurgical grade limestone, finding that the determination was "supported by substantial evidence."

Although appellant does not pretend that the limestone found on the Largo Vista claims has a calcium carbonate content comparable with that found by the court in Riddell to constitute chemical and metallurgical grade limestone, it points out in its present appeal, as it did at the hearing, that the paint and tile industries (appellant's principal markets) formerly used only high calcium limestone but that in recent years they have accepted high carbonate material without regard to its relative calcium-magnesium content (see Tr. 377-381). Appellant seemingly reasons that, since high carbonate material will now satisfy a market which formerly required a high calcium material of chemical grade, the high carbonate material must also be classified as chemical grade.

Although the terms "chemical grade limestone" and "metallurgical grade limestone" do not appear in the act of July 23, 1955, and they were not defined by the Senate committee using the terms, and have not been defined by this Department in its regulation, the terms have been judicially interpreted many times in connection with their use in the Internal Revenue Code of 1939. There, too, Congress did not define the terms but did state, through the Senate Finance Committee, that the terms were "intended to have their commonly understood commercial meanings." Riddell v. Victorville Lime Rock Co., *supra*, 292 F. 2d at 432; Wagner Quarries Co. v. United States, 154 F. Supp. 655, 659 (N. D. Ohio 1957); Erie Stone Co. v. United States, 304 F. 2d 331, 334 (6th Cir. 1962); Vulcan Materials Co. v. Sauber, 306 F. 2d 65, 67 (7th Cir. 1962). We have no reason to believe that the Senate Committee on Interior and Insular Affairs used the terms in its report on the 1955 act in any different sense. We believe therefore that the interpretation of the terms in the revenue laws is persuasive of their meaning with respect to the 1955 act.

None of the cases that we have found holding limestone to be chemical or metallurgical grade limestone required it to contain 95 per cent or more calcium carbonate. The courts were satisfied if the total carbonate content was 95 per cent or higher. Wagner Quarries Co. v. United States, *supra*, *aff'd* United States v. Wagner Quarries Co., 260 F. 2d 907 (6th Cir. 1958) (95 per cent average carbonate content, with up to 11.2 per cent magnesium

carbonates); Centropolis Crusher Co. v. Bookwalter, 168 F. Supp. 33 (W. D. Mo. 1958), aff'd Bookwalter v. Centropolis Crusher Co., 305 F. 2d 27 (8th Cir. 1962) (equivalent of 95 per cent calcium carbonate, but not 95 per cent calcium carbonate, required); Ideal Cement Co. v. United States, 263 F. Supp. 594 (D. Colo. 1966) (95.35 per cent average carbonates). 9/

One issue which divided the courts was whether dolomite, which is specifically listed in category (ii), could also qualify as a chemical or metallurgical grade limestone in category (iii). Two circuits finally concluded that it could, National Lime & Stone Co. v. United States, 384 F. 2d 381 (6th Cir. 1967); James River Hydrate and Supply Co. v. United States, 337 F. 2d 277 (4th Cir. 1964). One circuit held to the contrary, Vulcan Materials Co. v. Sauber, supra. Dolomite, of course, by definition contains far below 95 per cent calcium carbonate but a high grade dolomite contains over 95 per cent in total carbonates. Thus in National Lime the dolomite contained 54-55 per cent calcium carbonate and 45-44 per cent magnesium carbonate, and in James River the dolomite was approximately 54 per cent calcium carbonate and 44 per cent magnesium carbonate. The Vulcan case involved a 55 per cent calcium carbonate - 43 per cent magnesium carbonate dolomite, but rested on the proposition that "dolomite" is a more specific term than "limestone" and that the material in question consequently fell in category (ii) rather than category (iii).

With only the possible exception of the Vulcan case, therefore, the courts have held that a limestone averaging 95 per cent or more total carbonates constituted a chemical or metallurgical grade limestone within the meaning of the tax laws. 10/ Since

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9/ The court in the Ideal case adverted to Treasury Regulations 118 (1939 Code), sec. 39.23(m)-5(b), which fixed at 95 per cent by weight the minimum calcium carbonate and magnesium carbonate required to qualify limestone as chemical grade or metallurgical grade.

10/ Of course, the limestone held to be of chemical and metallurgical grade in the Riddell case averaged 99.30 per cent calcium carbonate but the court did not hold that a calcium carbonate content below that percentage or below 95 per cent would not qualify.

the rulings were based on the finding that such was the commonly understood commercial meaning of the terms "chemical grade" and "metallurgical grade" limestone, we are persuaded that the same meaning should be given to the Senate committee's understanding of what would constitute an uncommon variety of limestone. We hold, therefore, that limestone containing 95 per cent or more calcium and magnesium carbonates is an uncommon variety of limestone which remains subject to location under the mining laws.

Other distinctive properties claimed by appellant for the limestone deposits in the Largo Vista claims are freedom from impurities, whiteness of the material, and the pre-crushed nature of the material.

Freedom from impurities seems to be nothing more than a corollary of high carbonate content and requires no other consideration.

As for whiteness of the material, it is not clear whether it is inseparably correlated with carbonate content or independent of it or partially related to it. That is, would a 99 per cent calcium carbonate limestone necessarily be whiter than a 95 per cent calcium carbonate limestone? Would a 99 per cent calcium carbonate - magnesium carbonate dolomite? Is it possible for a lower total carbonate limestone to be whiter than a higher carbonate stone? An answer is necessary because it is not clear whether appellant is claiming that it has limestone on the Largo Vista claims of less than 95 per cent total carbonate content which is uncommon because of its whiteness and therefore subject to location irrespective of whether it is a chemical or metallurgical grade limestone.

Piercy seemed to indicate that the color of the limestone is independent of its chemical composition (Tr. 380) and this is suggested also by other evidence. Thus Piercy testified, as was also found in the Riddell case, supra, that the limestone from appellant's Victorville quarry was graded No. 1, No. 2, No. 3, and No. 4 according to degree of whiteness (Tr. 321). 11/ No. 1 is the purest white in color and is sold to the paint and other industries where color is extremely important. No. 2 is slightly stained and is used where color is less important. No. 3 has somewhat darker discolorations, and No. 4 is used for purposes where color is of no importance.

11/ It appears that the four grades have the following brightness on the appellant's reflectometer scale: No. 1, 97 per cent; No. 2, 90-97 per cent; No. 3, 85-90 per cent; No. 4, presumably below 85 per cent (Tr. 105-106, 373).

There is no specific evidence as to which grade or grades are considered to be uniquely white. We would suppose that grade No. 4, at least, would not be considered to be unique in color since it is used for products where color is of no importance. Yet it is interesting that all four grades were produced from a deposit found in the Riddell case to have an average of 99.30 per cent calcium carbonate and never less than 98 per cent. It was found in the Riddell case that 74 per cent of the limestone was sold to the paint industry, which predominantly was interested in No. 1 grade, possibly No. 2, that 24 per cent was sold for roofing granules, stucco, and plaster, a No. 2 grade use, and the remaining 2 per cent for foundry stone, presumably a No. 4 grade. Nothing was said in the Riddell case of No. 3 grade sales for rubber floor tile, oil well drilling, etc.

There is a significant indication in Piercy's testimony that only the No. 1 grade is considered to be unique in color. He had apparently testified in the Riddell case that the processing and sale of grades Nos. 2, 3, and 4 were "to a substantial extent, efforts to dispose of what would otherwise have been quarry waste either on a cost recovery or a possibility for a profit supplemental endeavor" (Tr. 419). He explained this by saying that it was correct in 1952 or 1953, that when the Victorville plant was started in 1948 the intention was to quarry only No. 1 grade rock and sell it to the paint trade. By 1950 it became apparent that this would be a costly operation, apparently because of the large tonnages of other material that would have to be removed and wasted. The Nos. 2, 3, and 4 grades were then developed to recover costs. (Tr. 419.) Although Piercy denied that those grades are primarily by-products sold to recover some of the operating costs, his testimony shows that at least for the years from 1948 to 1952 or 1953, the No. 1 grade was the only one believed to be valuable and unique.

It is interesting to note that at the time of the hearing on the Largo Vista claims Piercy testified that 30 per cent of appellant's production was going to the paint industry, which requires a No. 1 grade, that 20 per cent was used in the building industry, which has a No. 2 grade requirement, that 30 per cent was sold to the floor tile industry, which asks for a No. 3 grade, and that the remaining 20 percent was used where there is no color requirement so is presumably No. 4 (Tr. 371-375, 379-381). Presumably this included the production from Lucerne Valley so it is not apparent whether there had been any change in the proportions of production from the Victorville quarry as to the four grades.

Now what is the evidence as to whiteness of the limestone on the Largo Vista claims? Johnson testified that the Largo Vista No. 5 had the whitest material, practically a pure dolomite (Tr. 92-93), but he expressed the opinion that it was practically or economically impossible to come up with other than a No. 4 grade from the claims (Tr. 106). Carlisle reported that instrumental whiteness tests had not been made, only comparative visual estimates by him with the material from the Victorville quarry. He said the material on the Largo Vista No. 5 was of the same order of whiteness as Victorville, that perhaps 1/10 of the largest deposit on the claims (Block A, 6,800,000 tons, on Largo Vista Nos. 1, 2, 3, and 4) and 1/10 of the next largest deposit (Block B, 700,000 tons, on Largo Vista Nos. 2 and 3) would compare physically with Victorville, including color. He said that an estimated 1 1/3 million tons was "particularly white" but that the amount of "clean white limestone" in comparison with several dozen alternative sources was "small", and that highly selective mining would be required to produce "exceptionally white material". (Ex. 18, pp. 9-18; Tr. 252-253, 257-258.) None of Carlisle's testimony was in terms of grades, i.e., No. 1, 2, etc.

Piercy gave no detailed testimony concerning the nature of the deposits on the claims. He merely said in general terms that the "white material" needed by appellant was available from the claims and that the "high white color" was a special property of the deposits (Tr. 332, 349). However, he testified that 2500 tons of material had been removed from the claims and sold, the material being graded as No. 2 and some as No. 3 (Tr. 415, 417).

Appellant's witness Russell Wood, a consulting engineer, said that the whiteness of the Largo Vista deposits gave them special value (Tr. 486); however, he also said he was not qualified to classify limestone as to grade (Tr. 452). He said that a "large percentage" of the deposits was "a very large white rock" in comparison with other limestone deposits that he had seen, but only on the basis of a vague recollection could he say that the color compared "quite well" with the Victorville material (Tr. 452).

From this evidence we can draw only the conclusion that while there is white material on the Largo Vista claims, we know little of the degree or grade of whiteness and, particularly, whether such whiteness as does exist is unique or special in relation to other limestone deposits. And, again, we do not know whether whiteness is claimed as a property which would make

limestone on the claims having a total carbonate content of less than 95 per cent an uncommon variety. We conclude that the evidence in the record on whiteness as a special property is insufficient for a conclusion on this point.

We next consider the contention that the limestone on the claims is unique because, by virtue of its proximity to the San Andreas fault, it exists in a crushed state. Piercy testified that this natural state of the material made it easy to mine and that it would eliminate the necessity for a primary crushing on the claims, thus saving production costs. The Victorville material undergoes two crushing stages at the quarry. (Tr. 333-334, 338-339.)

This claimed special property is one that would presumably inhere in all the limestone on the claims, whether it be of chemical or metallurgical grade or not. Again, however, as in the case of color, it is not clear whether appellant is contending that limestone on the claims of less than 95 per cent total carbonate content is locatable as an uncommon variety because of this property alone.

Assuming that the natural crushed state of the limestone on the claims is a special property not found in the usual limestone deposit, the question is presented whether this property gives the limestone a distinct and special value so as to qualify it as an uncommon variety of stone. The only value claimed is that it will lessen the cost of production to the extent that it saves the cost of primary crushing at the claims. The limestone must still be crushed at the plant and further ground and processed as its ultimate uses demand.

In the recent case of McClarty v. Secretary of the Interior, 408 F. 2d 907 (9th Cir. 1969), the court suggested by way of dictum that the special value of a building stone which was naturally fractured into regular shapes and forms suitable for laying without further fabrication might be reflected by reduced costs or overhead so that the profit to the producer would be substantially more while the retail market price of the stone remained competitive with other stone. The court did not elaborate on its suggestion.

Whether the same reasoning might be applied to the situation here we do not know, but we are not, at least at this time, disposed to accept it as being in accord with the intent of the 1955 act. It is not likely that any two limestone deposits will be identical in their physical nature. One may occur in a solid mass, another

in a series of beds. One may have a few beds of rather substantial and uniform thicknesses with nominal interspersions of extraneous matter; another may have numerous beds of erratic shapes and sizes with numerous irregular or substantial intrusions of extraneous matter. The beds of different deposits may dip at various angles. All these factors may affect the ease and therefore the cost of mining so that one producer's costs may be less than another's. However, the end-product would be exactly the same; it would be sold for the same uses; and so far as the user is concerned would have the same value. We do not believe that Congress intended that an ordinary sand, gravel, stone, etc., which is indistinguishable from other ordinary sand, gravel, stone, etc. should be subject to mining location merely because a deposit of it can be mined more cheaply than other deposits. In the instant case we cannot accept the conclusion that a No. 4 grade limestone from the Largo Vista claims would have a special and distinct value over a No. 4 limestone from the Victorville quarry merely because the latter requires more crushing and is therefore more costly to mine. 12/

To summarize at this point our conclusions with respect to the unique properties of the limestone deposits on the Largo Vista claims which are claimed to make them uncommon varieties of limestone still subject to mining location, we agree that limestone with a total carbonate content of 95 per cent or more is a chemical or metallurgical grade limestone which is an uncommon variety. We cannot conclude whether the whiteness of the material on the claims is a unique property. And we reject the contention that the naturally crushed character of the stone is a unique property which gives the material a special and distinct value and makes it an uncommon variety.

We turn now to a consideration of the second principal issue, namely, whether a valid discovery of the uncommon variety of limestone has been made on each Largo Vista claim. At the outset changes in the claims made by the appellant since the taking of this appeal must be noted. With its brief filed on July 31, 1968, appellant filed copies of amended locations of Largo Vista Nos. 3 and 5 dated July 26, 1968. Prior to that time, the two claims comprised two end-to-end rectangles running in an east-west direction.

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12/ As noted earlier Johnson thought that the broken nature of the material impaired its metallurgical use (Tr. 138).

The east end line of the Largo Vista No. 3 abutted on the west side line of the Largo Vista No. 2 claim. The latter claim and the Largo Vista No. 1 comprised side-by-side parallel rectangles running north and south. By the amendment of July 26, 1968, the Largo Vista No. 3 was turned 90 degrees so that it now lies parallel with the Largo Vista Nos. 1 and 2, the east side line of the Largo Vista No. 3 being coterminous with the west side line of the Largo Vista No. 2. The Largo Vista No. 5 has simply been shifted eastward so that its east end line now abuts the new west side line of the amended Largo Vista No. 3.

The effect of the amendments is that the east half of the amended Largo Vista No. 5 now embraces land formerly in the west half of the old Largo Vista No. 3. The west half of the old Largo Vista No. 5 is now excluded from the amended claim. The east half of the former Largo Vista No. 3 remains in the amended claim. However, there have been added 5 acres to the north formerly in the Largo Vista No. 4 and 5 acres to the south previously not included in any claim. The appellant has now abandoned the Largo Vista Nos. 4 and 6, leaving only four claims in issue, the unchanged Largo Vista Nos. 1 and 2 and the amended Largo Vista Nos. 3 and 5. Further references in this decision to the latter two claims are to them as amended.

So far as the evidence in the case is concerned, the amendments have had the following effects: Carlisle showed a portion of Block A as lying in the southeast corner of Largo Vista No. 4 (Ex. 19). That portion is now included in the amended Largo Vista No. 3. Carlisle showed a portion of Block B as lying south of and outside of former Largo Vista No. 3. That portion is now included in amended Largo Vista No. 3. As far as sampling on the claims is concerned, sample 248 taken by Johnson and sample 19 taken by Wood, both in the west half of former Largo Vista No. 3, are now located in the east half of amended Largo Vista No. 5. This is the extent of the significant changes effected by the amendments.

In determining whether a discovery has been made on each of the four remaining claims, the critical consideration is whether a discovery has been made only of the uncommon variety of limestone on the claim. No consideration can be given to the value of the common variety of limestone that may exist on the claim even though that limestone may be marketable at a profit today. This is self-evident for since July 23, 1955, only an uncommon variety of limestone has been subject to mining location and it must stand on its own feet so far as discovery is concerned, unaided by its association

with a common variety. It cannot ride piggy-back, as it were, on the shoulders of a common variety. See United States v. Frank Melluzzo et al., 70 I.D. 184 (1963); cf. United States v. Mt. Pinos Development Corp., 75 I.D. 320 (1968). Thus the common limestone on the claims must be treated like the other worthless rock on the claims in evaluating whether a discovery has been made of the uncommon limestone.

To put it more concretely, suppose that a 99 per cent carbonate rock is so evenly intermingled with a No. 4 80 per cent carbonate rock that in order to obtain one ton of the 99 per cent rock it is necessary to mine two tons of the intermingled material. Suppose that mining costs are \$3.00 per ton so that it costs \$6.00 to extract the 2 tons of mixed material. Suppose further that the 99 per cent rock sells for \$5.50 per ton and the No. 4 rock at \$1.50 per ton. Obviously it would be unprofitable to spend \$6.00 to produce \$5.50 worth of 99 per cent rock, whereas it would be profitable if the \$1.50 return for the No. 4 material could be counted in. This is plainly impermissible, however, for it is tantamount to saying that the discovery of a locatable mineral, insufficient in itself, can be perfected by a discovery of a non-locatable mineral on the claim. <sup>13/</sup> Thus, in our example, the intermingled No. 4 rock must be treated as if it were a granite or other worthless rock. To hold otherwise would be to permit the easy frustration of the Congressional intent to bar location of common varieties after July 23, 1955.

With this prescription in mind, what does the evidence show as to the existence of 95 per cent or better carbonate limestone on the claims and as to its marketability at a profit? Carlisle mapped 3 blocks of limestone within the limits of the claims. His Block A, noted earlier as containing 6,800,000 tons, lies within the Largo Vista Nos. 1, 2, and 3. His Block B, also noted earlier as containing 700,000 tons, lies approximately half within Largo Vista No. 2 and half in Largo Vista No. 3. Block D, estimated as containing 600,000 tons, lies within Largo Vista No. 5. Carlisle took 6 samples, at least 3 from Blocks A and B, but while he had analyses of 4 of the samples at the hearing they were not introduced in evidence or explained (Tr. 237-240).

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<sup>13/</sup> In the Mt. Pinos case, the claimant attempted to establish the validity of a common variety sand and gravel claim on the basis that slight gold values, unprofitable to mine by themselves, could be profitably mined in conjunction with the extraction and sale of the sand and gravel in which the gold was found. The Department held that the gold would have to stand on its own and that on that basis there was an insufficient discovery of the gold.

Johnson took 2 samples from the Largo Vista No. 2, one from the Largo Vista No. 3, and 3 from the Largo Vista No. 5, all appearing to be from Blocks A, B, and D (Ex. 4). All but one sample from the Largo Vista No. 2 and one from Largo Vista No. 5 showed total carbonates in excess of 98 per cent (Ex. 7 and 8). The one exception from Largo Vista No. 5 (sample 248) showed 86.56 per cent, and the one from the Largo Vista No. 2 (sample 161) showed 88.14 per cent. The last sample has special significance. All the other samples were taken in 1958 in cuts pointed out by representatives of appellant. The samples were taken only of carbonate material believed to be usable. (Tr. 83-84, 88, 97-100.) Sample 161, however, which was taken in 1963 from Block A, was taken by chipping a piece of material at precise 5-foot intervals over a horizontal distance of at least 100 feet (Tr. 100-101, 198-199). This sample, then, would appear to be more representative of the material on the claims than the other samples which were of selected carbonate rock.

Wood took 12 samples from limestone outcrops on the 4 claims (Ex. G). None was a thorough channel sample but he made no effort to pick a darker or lighter rock (Tr. 477-479). Eight of the samples showed in excess of 95 per cent total carbonates; 4 showed less. They broke down as follows: All 3 samples from the Largo Vista No. 1 and 4 of the 5 samples from the Largo Vista No. 2 showed over 95 per cent; the one showed 93.9 per cent. Both samples from the Largo Vista No. 3 showed less than 95 per cent (92.2 and 94.8). One of the 2 samples from the Largo Vista No. 5 showed 95.9 per cent, the other 91.5 per cent. (Ex. H.)

An exhibit attached to appellant's application purported to show 8 samples from the original 8 claims each having a total carbonate content in excess of 96 per cent (Ex. D; Tr. 403). However, the exhibit was convincingly discredited as being exactly the same as exhibits attached to 5 other patent applications by appellant (Tr. 404-411). 14/

Of the total of 18 samples taken by Johnson and Wood from the 4 claims remaining in issue, 6 showed total carbonates below 95 per cent. The 3 samples taken by them from Block D in

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14/ The patent application was also admitted to be in error in stating that the entire deposit on the claims is about 99 per cent calcium carbonate (Tr. 412-413).

Largo Vista No. 5 and the 3 taken by Wood (Johnson took none) from Largo Vista No. 1 showed in excess of 95 per cent total carbonates. Of the remaining 12 samples taken by both from the Largo Vista Nos. 2, 3, and 5 (outside Block D), one-half were below 95 per cent in total carbonates. The sampling shows, we believe, that chemical or metallurgical grade limestone does not occur uniformly and consistently throughout the claims remaining in issue.

There is other evidence as to the consistency of the deposit on the claims. Johnson testified that the limestone occurred in bands or lenses of carbonate material, varying in chemical-physical composition from one lense to another within an arm span, within granitic and metamorphic rock types (Tr. 86-88). He said that, except for Block D in the Largo Vista No. 5, a clean carbonate material such as represented by the assays of his samples could not be mined (Tr. 104-105). Johnson concluded that the type of material on the claims "is of practically no significance from the standpoint of mining carbonate material, carbonate rock. It's dirty. It's so intermixed that it is almost impossible to come up with what you would call a carbonate product. In my estimation, it is just no good, in so many words." (Tr. 111.)

Carlisle reported that the lower 200 feet of Block A is "almost free of non-carbonate inclusions", that it is overlain by a zone 50-80 feet thick in which non-carbonate inclusions are "variously abundant", and that another zone of limestone above this may be as much as 100 feet thick. He referred to a cut in rather poor quality mixed limestone and non-carbonate rock and indicated that grey-white limestone was typical of Block A. (Ex. 18, pp. 10-12.) He did not describe Block B except to refer to a cut as showing "very sheared, iron stained, dirty limestone" (Ex. 18, p. 13). He said that a cut in Block D exposed material most closely approximating that mined in the Victorville quarry and that some of the material would have to be separated from non-carbonate inclusions (Ex. 18, pp. 14-15).

Wood did not give any detailed testimony as to the nature of the occurrences of limestone. He gave an estimate that there were 14,000,000 tons of carbonate rock on the Largo Vista Nos. 1 to 6 but that only 5,800,000 tons were minable. The reasons for the full tonnage not being minable were that the maintenance of a proper slope in the quarry face would not permit the removal of all the limestone and that there are inclusions within the limestone which would have to be cast aside. (Tr. 450-451.)

This evidence, together with the evidence on the sampling and Carlisle's estimate that there is a total amount of 8,100,000 tons of limestone, 1,333,000 tons of which are "particularly white", in Blocks A, B, and D, do not permit a proper conclusion to be drawn at this time as to the extent and nature of the occurrence of metallurgical or chemical grade limestone, or of uniquely white limestone, if such there is, of less than that grade, in the 4 claims at issue. It is therefore not possible to decide at this time whether the uncommon limestone on the claims is marketable at a profit and thus meets the test of discovery.

Piercy testified generally as to the selective mining of limestone to remove undesirable intrusions and to upgrade the material, adverting to the processes employed at the Victorville quarry (Tr. 298-300, 353-354). He said the same procedures would be followed on the Largo Vista claims (Tr. 337). This testimony does not militate against the conclusion just expressed because of its generalized nature. Furthermore, the available evidence does not show that the Largo Vista deposits are comparable to the Victorville deposit. As we have noted, the latter is almost pure calcium carbonate. And, although Piercy testified that at Victorville appellant was removing 100 tons of waste for 100 tons of limestone, the waste was not in the limestone; there was only one or two per cent of intrusives in the limestone (Tr. 382). Such purity of quality is not indicated for the Largo Vista deposits.

To conclude on the issue of discovery we believe that there is insufficient evidence in the record upon which to base a finding as to whether or not the chemical or metallurgical grade limestone on the 4 claims in issue can be marketed at a profit. The evidence is deficient as to the amount and the nature of occurrence of this grade of limestone in the claims and as to the costs of mining it in the state in which it exists on the claims.

The evidence is also insufficient for determining what degree of whiteness is claimed to be a unique property of the limestone and whether this unique property is claimed for any limestone of less than chemical or metallurgical grade on the claims. A fortiori, evidence is lacking as to whether limestone in that limited category is marketable at a profit.

The case must therefore be remanded for a further hearing to develop additional evidence on these points as to the limestone on each claim. It is not sufficient for evidence to be developed simply for the 4 claims as a unit.

One additional point merits comment. Appellant contends that the hearing examiner erred in failing to rule upon each of appellant's proposed findings of fact and that his failure to comply with departmental regulation 43 CFR 1852.3-3(b) 15/ requires that his decision be set aside. The Department has held, however, that where a hearing examiner's decision contains a ruling, in a single sentence, on all of the proposed findings and conclusions submitted by a party to a hearing, and the ruling on each finding and conclusion is clear, it is not necessary that the examiner rule separately upon each of the individual findings and conclusions. United States v. Joe Driear, 70 I.D. 10 (1963). Such is the case here, the hearing examiner having expressly found that:

"The contestee has within the time allowed submitted proposed findings of fact and conclusions of law consisting of 31 typed pages. Pages 1 through 28 consist of the history of the mining claims and excerpts from the transcript of testimony, most of which is uncontroverted and a portion of which appears elsewhere in this decision. Of the six proposed conclusions of law submitted by the contestee, none are acceptable as submitted for the reason set forth in the decision. A portion of the proposed conclusions submitted appear in the decision."

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15/ The regulation provides that:

"As promptly as possible after the time allowed for presenting proposed findings and conclusions, the examiner shall make findings of fact and conclusions of law (unless waiver has been stipulated), giving the reasons therefor, upon all the material issues of fact, law, or discretion presented on the record. The examiner may adopt the findings of one or more of the parties if they are correct. He must rule upon each proposed finding and conclusion submitted by the parties and such ruling shall be shown in the record. The examiner will render a written decision in the case which shall become a part of the record and shall include a statement of his findings and conclusions, as well as the reasons or basis therefor, and his rulings upon the findings and conclusions proposed by the parties if such rulings do not appear elsewhere in the record. \* \* \*"

The factual findings of the hearing examiner, as well as his conclusions of law and the basis therefor, were set forth in the decision, and, in effect, the hearing examiner held most of appellant's proposed findings of fact to be immaterial in determining the validity of the claims. If there was error in the decision, it lay in the substance of the rulings, not in the hearing examiner's failure to rule upon appellant's proposed findings and conclusions.

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 case is remanded for a further hearing in accordance with this decision and for resubmission to this office for a final decision at the conclusion of the hearing.

  
Ernest F. Hom  
Assistant Solicitor  
Land Appeals