

UNITED STATES

v.

ALICE A. and CARRIE H. BOYLE

A-30922 (Supp.) *Decided December 2, 1969*

Mining Claims: Common Varieties of Minerals

If a deposit of decomposed granite which is used for the same purposes as other deposits of the same material which are a common variety does not command a higher price in the market, it does not have a special and distinct value and it too is a common variety of stone not locatable under the mining laws after July 23, 1955.

Mining Claims: Generally—Mining Claims: Discovery

The provisions of Rev. Stat. sec. 2332 do not provide an independent means of acquiring title to a mining claim and particularly do not dispense with the necessity of their being a valid discovery on the claim.

Mining Claims: Discovery

The requirements for discovery on a placer mining claim located for a deposit of a common variety of decomposed granite are not satisfied by a vague showing of intermittent sales of small amounts in the years from 1943 to 1955.

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APPEAL FROM THE BUREAU OF LAND MANAGEMENT

In a decision dated March 26, 1969, 76 I.D. 61, the Department remanded this case for the development of fuller and clearer evidence on the competitive prices of decomposed granite in the Phoenix area.

The parties have each submitted a report and stipulated that no further administrative hearing need be held to receive more evidence.

The contestees' submission consists of a report by Hamilton A. Higbie, a registered geologist. Higbie's report adds little to the evidence presented at the hearing. After discussing the physical characteristics of the decomposed granite, he cites a statement of Earl Gudd, owner of the B & B Granite Company, who was a witness at the hearing. Gudd repeated his testimony that the price for landscaping granite varies from \$1.50 to \$3.50 per cubic yard; that competitors in the area of Apache Junction received approximately \$1 per cubic yard less for an inferior quality of granite.

Higbie then says that he spoke with other unspecified dealers selling landscaping granite in the area and that their prices were almost consistently \$2 less than that obtained by B & B. B & B, he says, gets \$6 per cubic yard for pit run material at Scottsdale, while its competitors were selling at prices of \$3.85 to \$4 per cubic yard. He also reports that at Mesa the owners of Dreamland Villa paid B & B \$1—\$1.50 per cubic yard more than they could get other granite for, but paid the higher price for the superior qualities of the B & B material. He further states that the Farnsworth Realty and Construction Company, the developers of Dreamland Villa, has used B & B's landscaping granite exclusively for the past "seven to eight years" due to its superior quality and that they purchase about \$1,000 worth of B & B granite per month.

The contestant, in turn, submitted a report of Charles K. Miller, a mining engineer. Miller made a detailed study of the location of pits selling decomposed granite in the general area of Phoenix and interviewed both buyers and sellers. He found that in the Mesa-Apache Junction area the best sources of decomposed granite are the contestees' claims, two pits in the Salt River Indian Reservation, about 10 miles northwest of contestees' claims, and six in the Tonto National Forest, which lie about a half mile north of the contestees' locations. He divided the market into five areas designated as Phoenix, Scottsdale, Tempe, Mesa, and Apache Junction. After consulting both sellers and buyers of decomposed granite, he compiled a table showing the delivered prices at which each seller sold a cubic yard of granite in each market area. The chart shows that, except in Phoenix, B & B, which is

the lessee of contestees' claims and sells all the materials taken from it, obtains no greater price for its product than any of its competitors. Several firms, one operating from the Salt River Indian Reservation, reported selling prices substantially higher than those of B & B and the other competitors.¹

While Miller found price variations among the various colors of decomposed granite, with red and pink commanding a higher price than bronze (gold), he found, except as noted above, no differences between suppliers for the same colors. The price variations from area to area were largely a matter of more intensive competition near the source of supply and the expense of haulage to the more distant area.

As to the Phoenix area, Miller said that Pit No. 1, some 20 miles north of the city, is considered the best source of decomposed granite from the standpoint of quality and quantity. Madison Granite, which operates Pit No. 1, reported that it sold and delivered to Zone 1 in Phoenix at \$3 to \$3.50 per cubic yard. Other sellers gave as their selling prices amounts ranging from \$2.50 for gray to \$7.40 for gold and red. B & B sold for \$5 to \$7 per yard.

The gold (bronze) granite is the best volume seller in the general market area and is preferred in the Phoenix, Scottsdale, and Tempe areas. The red is preferred in the Mesa and Apache Junction areas. As far as prices in Apache Junction are concerned, all 4 sellers in the area, including B & B, sold red, pink, and gold granite for the same price, \$1.50 per cubic yard.

The most this evidence establishes is that some of the relatively small demand for red and pink decomposed granite in Phoenix is met by material from the Apache Junction area, but at a price which, considering the distance and costs of haulage in the urban area, does not demonstrate any special value for it. In the nearest market, Apache Junction, where competition is keen, contestees' granite sells at the same price as the granite of 3 competitors. In the other marketing areas, also, as we have seen, it commands no higher price than that of its competitors and, in some instances, less.

Miller too consulted Gudd of B & B, which he described as the largest volume supplier of decomposed granite in the Apache Junction area. Gudd, he says, stated that B & B sold granite in Phoenix for \$5-\$7, in Scottsdale for \$3-\$4, in Tempe for \$3, in Mesa for \$2 to \$2.50, and in Apache Junction for \$1.50. Ross Farnsworth, of Dreamland Villa, said his firm paid \$2.50 for red and \$2 for gold granite per cubic yard at Mesa and that they will use about 2200 cubic yards in 1969.

¹ Miller commented that several suppliers said that the Reservation was the best red granite source in the area, but that the royalty it charged was so high that it could not compete with less desirable granite from other sources. The Reservation demands royalty of 52-72¢ per cubic yard while the Forest Service asks 10¢, as do the contestees.

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The material is used for both roads and landscaping.

The figures developed by Miller are at variance with those submitted by Higbie. We find the depth and detail of Miller's report more convincing and accept his statements as representing the actual conditions in the market.

We conclude then that as a material used for the same purposes as that taken from other deposits of widespread occurrence and as one which is not sold at a higher price than other similar materials, contestees' decomposed granite has no special and distinct value and is a "common variety" of stone within the meaning of the act of July 23, 1955, 30 U.S.C. sec. 611 (1964). Therefore, contestees' claims cannot be found valid on the basis that the deposit found on them is an uncommon variety of stone which is still open to location under the mining laws.

The contestees, however, allege that the claims are valid for other reasons. Having in the earlier decision left these for consideration, pending the resolution of the issue we have just discussed, we now turn to them.

First, the contestees contend that since they have held their claims as lode claims and worked them as placer for over 16 years prior to July 23, 1955, they are entitled to a patent, pursuant to Rev. Stat. sec. 2332, 30 U.S.C. sec. 38 (1964). This section provides:

Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working on the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

The contestees assert that they have satisfied all the requirements of the statute.

However, if Rev. Stat. sec. 2332 is available to them, they still must do more than show compliance with it, for it is well established that Rev. Stat. sec. 2332 does not constitute an independent means of obtaining a patent to a mining claim. Most important of all, it does not dispense with the necessity of a valid discovery. *Cole v. Ralph*, 252 U.S. 286, 307 (1920); *Susie E. Cochran et al. v. Effie V. Bonebrake et al.*, 57 I.D. 105 (1940); *Harry A. Schultz et al.*, 61 I.D. 259, 263 (1953). Thus, until the claimants can demonstrate that there is a valid discovery on each of the claims within the meaning of the mining laws the claims cannot be patented.

The contestees asserted that the claims were valuable on account of several minerals. They offered testimony that the claims had been worked for gold obtained by mining and milling the decomposed granite, the mine dumps, and the mill tailings. But whatever the past history of the claims may have been, there is no evidence that the claims are now valuable for placer gold. Similarly the recounting of the past use of limestone (1914-1940) from the claims to make mortar was not joined with proof that there is a present market for it or that the limestone is still locatable as an uncommon variety of stone (Tr. 168; Ex. B). In the absence of proof that a mineral deposit is of present value, the claim is not valuable for that mineral within the meaning of the mining laws. *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963).

The only other mineral on the claims that could support a discovery is, of course, the decomposed granite. But since we have concluded that it is not an uncommon variety of stone, it would have to be shown that a discovery of the material, within the ambit of the prudent man rule as refined by the marketability rule, had been made prior to July 23, 1955.

Before we consider that issue, however, we turn to the contestees' second major contention, which is that their placer locations, filed in 1964 as amendments of their lode locations, related back to the original lode locations made in 1939. The hearing examiner, as we noted in the original decision, held that the validity of the claims was to be judged as of the date of the location of the claims as placers in 1964. He refused to consider the placer locations to be amendments of the 1939 lode locations, as amended in 1941.

Here again the same considerations that were applicable to the discussion of Rev. Stat. sec. 2332 apply. The 1939 locations, if they were enough to sustain mining claims, lost their validity when the gold in lode, or even in placer form, and the limestone were worked out. A location without a discovery cannot validate a mining claim. *Cole v. Ralph, supra*, 295-296.

Again, therefore, if the relation back of the 1964 placer locations to 1939 is to aid appellants at all, it is necessary for them to show that they had made a valid discovery of the decomposed granite prior to July 23, 1955. We now address ourselves to that issue.²

In order to satisfy the requirements of discovery, the appellants must show that as of July 23, 1955, the deposits from each claim could have been extracted, removed, and marketed at a profit. Marketability

²This is not to be taken as an indication that we agree with appellants' arguments concerning the effect of Rev. Stat. § 2332 or the relation back of the placer locations in 1964. It is not necessary to rule on their contentions since the issue to be considered is dispositive of the case in any event.

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can be demonstrated by a favorable showing as to such factors as accessibility of the deposit, bona fide in development, proximity to market, and the existence of a present demand for the material, that is, a demand when the deposit was subject to location. *United States v. Coleman*, 390 U.S. 599 (1968); *Foster v. Seaton*, 271 F. 2d 836, (D.C. Cir. 1959); *United States v. Alfred N. Verrue*, 75 I.D. 300 (1968).

What evidence did appellants present of marketability of the decomposed granite prior to July 23, 1955?

Robert Graham, a technical representative for the contracting officer at Williams Air Force Base, some 20 miles from the claims, who was in charge of all payments, maintenance, and new work, testified that "several hundred tons" of material from the Boyle claims were used in 1944-1947 to surface driveways, parking lots and even sidewalks on the airbase (Tr. 143, 144, 145), but that none had been used since 1947 (Tr. 147).

Elmer Boyle, the husband of Alice Boyle, testified that a lot of granite had been removed between 1947 and 1955, that it sold for 0.5 cent a yard if the purchaser loaded it himself (Tr. 171-173).

In an affidavit submitted as her testimony at the hearing (Ex. B), Alice Boyle stated that there has been "continuous" production of decomposed granite from the claims since the early 1940's, that a computation of the material removed could come to over 400,000 cubic yards, although Zentner, the Bureau of Land Management mineral examiner, had conservatively estimated it to be at least 30,000 cubic yards, that few records were kept of sales prior to June of 1955, but that Hubert Massey excavated and removed material in 1951 and 1952, and John Wing did the same in 1952, with one sale being for 1000 yards. She also said that Gail Boyle removed material from the claims in 1955 and 1956 for a small business he ran in Mesa, selling materials to residents there for driveways, and that there were numerous other small sales of which no records were kept.

She next states that in 1959 the claims were leased to Mr. Brisbois who removed 23,929 yards at 0.5 cent per yard from 1959 to 1962. Brisbois then assigned the lease to Earl Gudd who, she said, has since removed 18,215 yards at 0.6 cent per yard.

The crucial parts of Mrs. Boyle's testimony are those that relate to the sales made prior to July 23, 1955. Aside from general allegations that sales were made on a continuing basis, her testimony itself adverts only to a few sales in small amounts. She did not say what the airbase sales amounted to, but that a receipt dated February 19, 1948, representing only part of the sales, was for 500 cubic yards at 0.5 cent a yard (Tr. 110). We have noted that Graham testified that "several hundred

tons" were used on the base. At 0.5 cent a yard, a sale of 1,000 yards would have returned only \$50 for the period 1944-1948. The sales claimed for 1951 and 1952 were for unspecified amounts and were unsupported by any business records or other corroboration. Again the only definite sale recalled disposed of 1,000 cubic yards. Finally, the statement that Gail Boyle removed material in 1955 and 1956 is totally devoid of supporting details and besides refers to "a small business" run by Boyle; moreover, it does not necessarily indicate even that sales were made prior to July 23, 1955.

The most this testimony establishes is that there were a few intermittent sales of decomposed granite consummated on a rather off hand basis. Since it is a claimant's obligation to prove the validity of his claim, it is his responsibility to keep records adequate to demonstrate his assertions that he has disposed of material from the claims. His unsupported statements about matters that are, or should be, readily sustainable by other evidence are not persuasive.

We cannot conclude that the contestees have demonstrated by a preponderance of the evidence that they have satisfied the test to support a discovery of a common variety of decomposed granite prior to July 23, 1955, within the meaning of the mining laws.

Accordingly, the mining claims were properly declared invalid.

The appellants have recently requested an opportunity to present oral argument. We do not believe that oral argument is necessary or would be helpful to an understanding of the applicable law or evidence. Consequently the request is denied.

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 Office of Appeals and Hearings is affirmed.

ERNEST F. HOM,
Assistant Solicitor.