

land embraced within the limits of each location is nonmineral in character, and consequently that only a single \$5 filing fee is required on this appeal.

The Department construes the provision regarding the payment of filing fees to mean that if more than one mining claim is involved in an appeal, a filing fee of \$5 must be paid for each separate claim on which the appellant is seeking favorable action. Presumably Matsen is seeking favorable action on each of the 12 mining claims and the mill site which were declared null and void by the examiner's decision of November 30, 1956. Accordingly, the requirement that a filing fee of \$5 be paid for each of the separate claims and the mill site is proper.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

UNITED STATES

v.

LAURA DUVALL AND CLIFFORD F. RUSSELL

A-27717

Decided November 19, 1958

Mining Claims: Discovery

Where the alleged discovery in a mining claim consists only of an indication of tungsten and zirconium which of themselves do not warrant a reasonable man in the further expenditure of time and money with the reasonable prospect of success in an effort to develop a valuable mine, there has been no valid discovery of a valuable mineral deposit within the meaning of the mining laws.

Mining Claims: Discovery

In the absence of a valid discovery within the meaning of the mining laws, the mere hope or expectation based upon a general belief that values increase with depth is not sufficient to validate a mining claim.

Mining Claims: Special Acts

Where the deposits for which a mining claim has been located are a common variety of sand or stone, are of widespread occurrence, and are the country rock of the area, they are materials which the act of July 23, 1955, has removed from the category of valuable mineral deposits locatable under the mining laws and the fact that they, in common with all similar materials, may be of use and value for commercial purposes does not exempt them from the stricture of the statute.

Mining Claims: Mill Sites

A mill site which is not used for mining or milling purposes in connection with a lode claim and which does not contain a quartz mill or reduction works is invalid.

*November 19, 1958***Mining Claims: Mill Sites**

A mill site which is used solely in connection with placer claims is invalid.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Laura Duvall and Clifford F. Russell have appealed to the Secretary of the Interior from a decision dated April 15, 1958, of the Director of the Bureau of Land Management which affirmed a decision by a hearing examiner holding two placer mining claims and a mill site claim to be null and void.

The claims are situated in sec. 31, T. 6 S., R. 5 W., sec. 36, T. 6 S., R. 6 W., and sec. 1, T. 7 S., R. 6 W., S. B. B. M., California, and are within the Cleveland National Forest. Contest proceedings were initiated against the claims on the basis of two complaints by the United States Forest Service, Department of Agriculture,¹ on charges that the placer claims, the Ortega Highway and County Line (Decomposed Quartz Diorite) Placer Claims Nos. 1 and 2, were invalid because the land within the claims is nonmineral in character and no discovery of mineral has been made and that the mill site claim, called the Duvall and Russell mill site claim, is not used in connection with a vein or lode and does not contain a quartz mill or reduction works.

A 2-day hearing was held before a hearing examiner at which the United States was represented by the Office of the Solicitor, Department of Agriculture (43 CFR 205.7), and the contestees by their attorney. Each side presented several witnesses and offered numerous exhibits. In a decision dated April 25, 1957, the hearing examiner found that the deposits of tungsten and zirconium on the claims did not constitute a valuable discovery under the mining laws, that the deposits of decomposed granitic material and massive granitic rock, while marketable, were common varieties of stone or stone and sand and not locatable under the mining laws. He also found that the mill site claim was not being used in connection with a vein or lode, and that it did not contain a quartz mill or reduction works. He therefore held the placer claims and the mill site claim null and void.

Upon appeal, the Director affirmed the hearing examiner's decision and, in addition, reversed the hearing examiner's finding that the deposits of decomposed granitic material and massive granitic rocks were marketable at a profit.

It appears that the placer claims were first located by a group of eight locators, including the contestees, on January 7, 1956, for deposits of decomposed quartz diorite, covering approximately 160 acres each. The original locations were later amended. The mill site claim was located by the contestees on March 15, 1956. Finally,

¹ 43 CFR 205.6.

on October 8, 1956, the contestees located the Los Tres Amigos No. 1 lode claim. The mill site and lode claims apparently overlap or abut each other and both are within the exterior boundaries of placer claim No. 1 (Ex. 18, G).²

In addition to the materials for which the placer claims were originally located the contestees assert that they contain deposits of tungsten and zirconium, so that the claims are alleged to be valuable both for minerals of wide occurrence, the decomposed granitic material, and for relatively rarer minerals, the zirconium and tungsten.

The latter deposits, as valuable mineral deposits in the public lands, are open to exploration and purchase and the lands in which they are found are open to occupation and purchase except as they have otherwise been withdrawn or reserved for other disposition (30 U. S. C., 1952 ed., sec. 22). While the lands remain open and until other rights have attached to them, the discovery of a valuable mineral deposit within the limits of the claim will validate the claim (30 U. S. C., 1952 ed., secs. 23, 35). A valid discovery, it has often been held, is one which would warrant a man of ordinary prudence in the further expenditure of his time and money with a reasonable prospect of success in an effort to develop a valuable mine. *Castle v. Womble*, 19 L. D. 455 (1894); *Chrisman v. Miller*, 197 U. S. 313 (1905); *United States v. Strauss et al.*, 59 I. D. 129, 137, 138 (1945); *United States v. Everett Foster et al.*, 65 I. D. 1 (1958).

The evidence relating to the values of the tungsten and zirconium in the claims is summarized in the Director's decision and need not be restated. The contestees do not assert that the values indicated by their assays warrant a finding that the deposits tested are of commercial quality. They contend that the values warrant further exploration within the criterion as to what constitutes a discovery of a valuable mineral and that further exploration may lead to the development of more valuable deposits (Tr. 307, 308, 321). The basis for this expectation seems to be the theory expounded by Samuel Duvall, husband of Laura Duvall (Tr. 315), that, in general, richer zones of minerals are found the further down one goes (Tr. 308). He did not offer any other support for his theory and did not apply it in particular to the deposits in question.

A mining engineer, employed by the United States Forest Service, Department of Agriculture, testifying for the contestant, stated that the deposits of zirconium and tungsten were of no significance and that there was no reason whatsoever to expect a concentration of these minerals with an increase in depth (Tr. 328-329).

The most that can be said for the contestees' evidence is that it

² References to Exhibits (Ex.) are to the exhibits submitted by the parties at the hearing and references to the transcript (Tr.) are to the transcript of the hearing.

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expresses a hope or expectation that the deposit will increase in value as the depth increases. These are not enough to validate a mining claim. *East Tintic Consolidated Mining Claim*, 40 L. D. 271 (1911); *United States v. Josephine Lode Mining and Development Company*, A-27090 (May 11, 1955); *United States v. Francis N. Dlouhy et al.*, A-27668 (September 24, 1958).

Moreover, since these claims lie in a national forest, the evidence sustaining the validity of the mineral locations must be clear and unequivocal. *United States v. Black*, 64 I. D. 93, 95 (1957); *United States v. Dawson*, 58 I. D. 670, 679 (1944); cf. *United States v. Langmade and Mistler*, 52 L. D. 700 (1929).

On the basis of the entire record, it must be concluded that there has been no discovery of valuable deposits of zirconium and tungsten within the limits of the placer claims.

The other minerals which the contestees say give validity to the placer claims are a decomposed granitic material, which lies in depth upon the claims, just under the topsoil, and massive granitic rocks. As the Director pointed out, there was a great deal of dispute at the hearing as to whether the decomposed granitic material was granodiorite or quartz diorite, which are distinguished from each other on the basis of the amount of orthoclase, a feldspar, they contain. Whatever the proper technical nomenclature of the material is, to validate the mining claims it must be a mineral locatable under the mining laws. Section 3 of the act of July 23, 1955 (30 U. S. C., 1952 ed., Supp. V, sec. 611), amended the mining laws by removing certain materials from the category of valuable mineral deposits. It provides:

A deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: *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 a 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.

Since the placer claims in question were located after the date of the act, if the mineral on which the validity of the location depends is one of those which cannot constitute a valuable mineral deposit, the claims are invalid.

The contestant's evidence was entirely to the effect that the granodiorite (or quartz diorite) was a common variety of stone, that it constituted the country rock of a widespread area, and that the granitic rock was also part of the country rock of the area. The locators' evidence to the contrary consisted of a map (Ex. H) pre-

pared by Rene Engle, a geologist, which indicated a deposit of quartz diorite at the site of the placer claims. The map cannot of itself overcome the persuasiveness of the testimony of the Government geologists who examined the area in question. Therefore, it is my conclusion that the granodiorite (or quartz diorite) is of widespread occurrence, is the country rock of the area, and is a common variety of stone.

The contestees assert that despite this the granodiorite or quartz diorite is still locatable under the mining laws because it is usable as a road base material without processing. However, assuming that the deposit has this virtue, it still does not distinguish it from all the other similar decomposed granitic material in the general area. This is made clear in the regulation which states:

"Common varieties" as defined by decision of the Department and of the courts include 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. Section 3² of the law has no application where the mineral for which a location is made is carried in or borne by one of such common varieties. 43 CFR, 1957 Supp., 185.121 (b).

² Thus, while marble would not be a common variety of stone, ordinary building stone or sand and gravel or pumice or limestone used in building would be.

The deposits on the claim do not have a special and distinct economic use value over and above the general run of such deposits.

Similarly the massive granitic rock on the claims is part of the country rock of the area, is of widespread occurrence, and is a common variety of stone. Therefore, it is not locatable under the mining laws.

This leaves for consideration the mill site claim. The statute creating such claims states:

Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface-ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes * * *. The owner of a quartz-mill or reduction-works, not owning a mine in connection therewith, may also receive a patent for his mill-site, as provided in this section. 30 U. S. C., 1952 ed., sec. 42.

It is undisputed that the contestees are using the mill site solely for stockpiling material and storing portable equipment, all from or in connection with the placer claims.

A mill site located pursuant to the first provision of the statute must be used in connection with a *lode* claim. Lindley on Mines, 3d ed., sec. 523. The contestees have not cited, nor have we discovered, any case in which the validity of a mill site was based upon its use in connection with a *placer* claim. Since there is no quartz mill or re-

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duction works on the mill site, it cannot be valid under the second clause. Accordingly, I conclude that the mill site does not meet the requirements of either portion of the statute.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Director of the Bureau of Land Management holding the placer mining claims and the mill site claim null and void is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

APPEAL OF LARSEN-MEYER CONSTRUCTION CO.

IBCA-85 *Decided November 24, 1958*

Contracts: Appeals—Contracts: Delays of Contractor—Contracts: Unforeseeable Causes

A contractor who seeks an extension of time under a standard form construction contract because of an alleged excusable cause of delay has, in general, the burden of proving that the alleged cause of delay actually existed, that it met the criteria of excusability prescribed by the contract, that it delayed the orderly progress or ultimate completion of the contract work as a whole, and that it did so for a given period of time.

Contracts: Unforeseeable Causes

The contingency that some event of local public interest will cause a temporary increase in traffic on a road under improvement is one so apt to happen that it would normally be allowed for in a road contractor's pre-bid traffic estimate, and, therefore, such an occurrence does not constitute an unforeseeable cause of delay even though the particular event that causes the traffic increase is one which, although annual, has neither a fixed date nor a fixed site.

Contracts: Unforeseeable Causes

The unusualness of the weather on a stormy day cannot be determined merely by measuring the severity of the weather on that particular day against the average weather for the same day in prior years, but must be determined on a basis that takes account of the frequency with which days of like or greater severity occurred during the same months or seasons of prior years.

Contracts: Contracting Officer—Contracts: Suspension and Termination

Under a contract which empowers the contracting officer to suspend the work when the weather is unsuitable, or conditions are unfavorable for its suitable prosecution, the action of the contracting officer in fixing the date on which a suspension is to begin or end does not preclude the retroactive allowance of extensions of time for a period immediately preceding or following the date so fixed, if during such period no real progress on the contract work was achieved by reason of weather conditions that clearly were unsuitable or unfavorable.