

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

ERNEST F. HOM,  
*Assistant Solicitor.*

UNITED STATES v. MT. PINOS DEVELOPMENT CORP.

A-30823

*Decided September 27, 1968*

Mining Claims: Common Varieties of Minerals—Mining Claims: Discovery

The marketability of sand and gravel from a claim located after the act of July 23, 1955, for sand and gravel is not sufficient to validate the claim if the deposit has no property giving it a distinct and special value since un-

355 F. 2d 601 (Ct. Cl. 1966). This case concerned freight rates chargeable to the Government for shipments of manganese ore in Montana in 1953, 1954, 1955 and 1958 under the same stockpiling program of the Government (under the Defense Production Act of 1950, 64 Stat. 798). As the Court said:

"\* \* \* The stated purpose of the program was to obtain from marginal or submarginal sources manganese ore which would not be otherwise produced, with the reservation that the Government could exclude presently established production of manganese ore from participation in the program.

"At all times pertinent in this case, there were no known major sources of high grade manganese ore in the United States. To obtain substantial amounts of manganese from domestic ores, such metal would have had to be extracted from low grade ores like those in the pertinent shipments. During the time of the shipments, the market value of commercial manganese ore varied from 60 to 65 cents per long ton unit, with the manganese content of such marketable ore ranging from 44 to 50 percent, as contrasted with the above-stated incentive price of \$2.30 per long ton unit, paid by the defendant for low grade ores which had an average manganese content of only 23.4 percent.

"The ores in the pertinent shipments had no market value and could not have been sold at any price other than to the defendant at incentive prices under the stockpiling program." 355 F. 2d 602-603.

The Court rejected the shipper's contention that the price paid by the Government for the ores was the value to be certified under the commodity tariff rules. The Government contended that the ores had no market value, so that it was entitled to the lowest commodity rate. On this question the Court's discussion of value has significance and relevance to the question of value here as it relates to deposits of minerals and their economic value under the mining laws:

"\* \* \* The ordinary meaning of value is market value, or the fair price reached by a buyer and seller, both willing to act, and both informed about the open market. In the sale of ores, value contemplates the commercial price reasonably to be paid upon consideration of the costs which will be incurred to produce therefrom a metal which can be profitably used or marketed. Hard reality forces one to conclude that assays and other ore tests in the smelting industry are directed to such commercial determinations, and that the term "value" in the commodity tariff rules means the commercial or market value as determined by the "settlement between shipper and consignee \* \* \* made on basis of return or assay by said smelter or industry." Reasonable construction of the term "value" requires rejection of the contention that the artificially created incentive prices under the stockpiling program constituted the values of the ores. Proper rules of construction should not permit the unusual facts of this case to bring about a result which is contrary to the ordinary meaning of the term value and to the basic principle of commodity tariffs to fix rates on the actual value of the article shipped." 355 F. 2d 605.

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der that act common varieties of sand and gravel must be disposed of under the Materials Act and are not locatable under the mining laws.

#### Mining Claims: Common Varieties of Minerals

A sand and gravel deposit which may have the necessary qualities for road, tunnel and dam construction projects nearby and is marketable but has no property giving it a distinct and special value for such purposes or for other purposes for which other commonly available deposits may be used is a common variety within the meaning of the act of July 23, 1955, and, therefore, is not locatable under the mining laws.

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

Where a mining claim containing common varieties of sand and gravel not locatable under the mining laws also contains slight values of fine gold which the mining claimant alleges may profitably be extracted in connection with the removal and sale of sand and gravel from the claim, in order for the claim to be valid there must be sufficient gold of a quantity and quality to satisfy the prudent-man test of a discovery of a valuable mineral deposit independently of the value of the sand and gravel.

#### Mining Claims: Discovery

A showing of mineral values which might warrant further exploration for minerals within a mining claim but would not warrant development of a mine is insufficient to establish a discovery of a valuable mineral deposit under the mining laws.

#### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Mt. Pinos Development Corporation has appealed to the Secretary of the Interior from a decision dated May 11, 1967, by the Chief, Office of Appeals and Hearings, Bureau of Land Management, which affirmed a hearing examiner's decision of August 24, 1966, declaring the Dry Creek No. 1 placer mining claim located in secs. 4, 5 and 9, T. 7 N., P. 19 W., S.B.M., California, within the Los Padres National Forest, to be null and void for lack of a valid discovery of a valuable mineral deposit within the meaning of the mining laws.

The mining claim was originally located on November 8, 1963, and was conveyed by the original locators to the Mt. Pinos Development Corporation on January 23, 1964. At the instigation of the Forest Service a contest was brought against the claim with the complaint charging that a discovery of a locatable material has not been made and maintained and that the land is nonmineral in character. After a denial of these charges by the contestee, a hearing was held on March 15, 1966, for receiving evidence on the issues raised by the proceedings.

From our review of the entire record in this case it is apparent that the decisions of the hearing examiner and the Office of Appeals and Hearings are correct and that they sufficiently set forth the pertinent

law and facts involved. Repetition then shall be made only to set appellant's issues in perspective and for further emphasis.

The appellant has contended that the claim is a valid claim because it contains a valuable deposit of marketable sand and gravel and also because it contains gold. The decisions below found that the sand and gravel within the claim, although marketable, is a common variety not locatable under the mining laws, and that the gold values shown within the claim are insufficient to establish a discovery of a valuable mineral deposit.

With respect to the sand and gravel, appellant insists that the deposits of the sand and gravel within the claim are marketable and thus the claim is valid. It states that it has entered into a contract with the State of California to sell 3,000,000 tons of sand and gravel for use in a highway construction project (Contestant's Exhibit 14), and also that it has entered into another lease-contract with the Littlerock Aggregate Company whereby additional materials are to be used in construction of four water tunnels and a dam (Contestee's Exhibit B).<sup>1</sup> Appellant contends that the highway and water tunnels are under construction and there is a present need for the sand and gravel materials from the claim, that both operations are presently "being penalized" by the necessity of paying higher prices for hauling the required materials longer distances to points of use because of this contest.

In response, the Forest Service points out that under the Materials Act, 30 U.S.C. sec. 601 (1964), the sand and gravel would be available to the State of California for highway construction without charge. It contends that appellant's claim frustrated such disposition to the State and that the claim was filed only after the property had been shown to the State's agent and the State indicated its interest (Tr. 112-115). It also contends that the sand and gravel here is a material of "dreary ordinariness, suited only for the uses of the general run of deposits of this kind," and that the fact it may have commercial value does not mean it is an uncommon variety, as the Materials Act presupposes that common varieties may be valuable for they are subject to sale by the Secretary.

Appellant lays a great deal of stress upon the marketability of the sand and gravel and appears to take the position that if marketability is shown this is all that need be shown to validate the claim. It refers to a discussion of the "marketability rule" as applied to the law of discovery in a *Solicitor's Opinion*, 69 I.D. 145, 146 (1962), saying that

<sup>1</sup> It is noted that under section 5 of the contract with the Littlerock Aggregate Company, the lessor (appellant) agrees "to endeavor to obtain a cancellation of that certain agreement with the State of California for the extraction of sand and gravel from the leased premises."

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the following specifically applies to the deposit here under consideration:

\* \* \* The extreme example is probably sand and gravel, but in many areas the available deposits far exceed the market. In such cases we must insist that the locator show that there is a market actually existing for his minerals. To validate any sand and gravel claim proof of present marketability must be clearly shown.

Obviously appellant has confused the issue here with the test as to what constitutes a valid discovery of a "valuable mineral deposit" within mining claims. It had nothing to do with the meaning of the term "common varieties" used in section 3 of the act of July 23, 1955, as amended, 30 U.S.C. sec. 611 (1964). Appellant seems to labor under the misconception that a common variety of minerals is one that is not marketable therefore; if a mineral is marketable it is not a common variety. This, of course, is completely wrong.

Under the mining laws, a valid mining claim exists only when the claimant has discovered a "valuable mineral deposit" within the limits of the claim, 30 U.S.C. secs. 22, 23 (1964). Over 73 years ago the Department defined what constitutes a discovery of a valuable mineral deposit:

\* \* \* [w]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. *Castle v. Womble*, 19 L.D. 455, 457 (1894).

In this terse general form the prudent-man test sufficed for many years when the mineral involved consisted of gold or silver or some other intrinsically valuable mineral. But when discoveries were claimed for far more commonly occurring minerals, such as building stone, sand and gravel, an elaboration of the prudent-man rule to identify more precisely the factors that a prudent man would consider in determining whether to commence development of a mine was natural or inevitable. This elaboration or refinement became known as the marketability rule. Its essence was that no prudent man would be justified in expending his labor and means to develop a mineral deposit unless the mineral could be extracted, removed, and marketed at a profit.

The marketability test was attacked as an improper standard and as an unauthorized departure from the prudent-man test. It was to answer this attack that the *Solicitor's Opinion* of September 20, 1962, *supra*, was issued. The opinion pointed out that the marketability rule was merely one aspect of the prudent-man test. This view has recently been confirmed by the United States Supreme Court in *United States v. Coleman*, 390 U.S. 599 (1968).

The marketability rule, like the prudent-man rule, has nothing to do with the question of "common varieties." This is at once obvious in that the modern expression of the marketability test was enunciated in the sand and gravel case of *Layman et al. v. Ellis*, 52 L.D. 714 (1929), almost 26 years before enactment of the act of July 23, 1955, *supra*. Prior to the latter date there were deposits of ordinary sand and gravel which satisfied the marketability test and were therefore subject to valid mining location. There were probably many more deposits of ordinary sand and gravel which did not meet the marketability test and which therefore could not be validly located under the mining laws. No legislation was necessary to exclude from mining location deposits in the second category; legislation was needed only to exclude from location deposits in the first category, *i.e.*, deposits of ordinary sand and gravel which satisfied the marketability test. This was the purpose of section 3 of the act of July 23, 1955, 69 Stat. 368, which provided that—

A deposit of common varieties of sand, stone, gravel \* \* \* 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 \* \* \*<sup>2</sup>

Thus the statute clearly barred from location after July 23, 1955, deposits of common varieties of sand and gravel which would satisfy the marketability test. It is not enough then for appellant to show that the material on its claim is marketable. See *United States v. E. M. Johnson et al.*, A-30191 (April 2, 1965).

Section 3 of the act of July 23, 1955, provides that common varieties do not include deposits of such materials "which are valuable because the deposit has some property giving it distinct and special value." Therefore, as to claims for sand and gravel located after this act, it is not only necessary to show marketability, but in addition that the deposit has a property which gives it a "distinct and special value."

In contending that the deposit is not a common variety of sand and gravel, appellant refers to its brief to the Director, Bureau of Land Management, and to testimony by its witnesses that the material within the claim meets the standards listed in the Department's regulation 43 CFR 3511.1(b). It emphasizes that portion of the regulation which reads as follows:

\* \* \* 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

<sup>2</sup> Amended without change in substance by the act of September 28, 1962, 30 U.S.C. § 611 (1964).

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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. \* \* \*

Appellant and its witnesses at the hearing particularly emphasized the facts regarding the location of the claim and proximity to a market and the fact that there is a sizable quantity of the sand and gravel as satisfying the requirements of this regulation. However, the regulation only indicates that these are factors which may be considered in determining *commercial value*. They are not the factors which determine whether the deposit "has distinct and special properties." In other words, the regulation speaks of two different things that are necessary to make a deposit locatable as an uncommon variety: (1) it must have distinct and special properties, and (2) those properties must make it commercially valuable. The factors of quality and quantity, proximity to market, accessibility to transportation, etc., merely go to establishing commercial value, and they are substantially the same factors that are to be considered in determining whether a deposit is marketable. The factors of marketability required to be shown by a claimant are set forth as follows in a *Solicitor's Opinion* of September 21, 1933:

\* \* \* the mineral locator or applicant, to justify his possession, must show that by reason of accessibility, *bona fides* in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit. 54 I.D. 294, 296 (1933).

This is the language quoted in *Foster v. Seaton*, 271 F. 2d 836 (D.C. Cir. 1959), in the court's discussion and approval of the marketability test. The factors listed as pertinent to determine marketability are substantially identical with those enumerated in the regulation for determining commercial value.

Appellant mistakenly assumes that establishing commercial value *ipso facto* establishes the existence of special and distinct properties. Thus it argues that:

\* \* \* commercial value implies trade and bargaining in market place for things of special value. The raw material such as sand and gravel acquires commercial value in the sale by the price paid by the buyer to the claim owner for the material acquired. It acquires additional commercial value when it is processed from its raw state through the sand and gravel equipment by washing it free of clay, separated into particular sizes required for special uses according to specifications for the various layers of aggregate and concrete in highway construction in accordance with adopted plans. It may be sold after processing to some industry for further processing or manufacturing. The variety of uses of the material is beyond his control and power to determine after the claim owner parts with its ownership. Contestee as owner of the mining claim cannot and is not required by the mining regulations to do the processing or the manufacturing for industrial uses of the sand and gravel materials.

To make it marketable, Contestee is not responsible for any use or misuse of the material after sale to a buyer, and the mining law cannot direct or dominate its use. It is his property to hold or sell or use as he will, whether in the raw state, processed, or manufactured into some other ultimate product.

It is true that the value of a raw material is determined in the market place by the price that it can command. However, the fact that it sells for a price does not necessarily establish that it has distinct and special properties. The pertinent criteria which must be considered were recently discussed in *United States v. U.S. Minerals Development Corp.*, 75 I.D. 127, 134 (1968), as follows:

\* \* \* the Department interprets the 1955 act as requiring an uncommon variety of sand, stone, etc., to meet two criteria: (1) that the deposit have a unique property, and (2) that the unique property give the deposit a distinct and special value. Possession of a unique property alone is not sufficient. It must give the deposit a distinct and special value. The value may be for some use to which ordinary varieties of the mineral can not be put, or it may be for uses to which ordinary varieties of the mineral can be or are put; however, in the latter case, the deposit must have some distinct and special value for such use. For example, suppose a deposit of gravel is found which has magnetic properties. If the gravel can be used for some purpose in which its magnetic properties are utilized, it would be classed as an uncommon variety. But if the gravel has no special use because of its magnetic properties and the gravel has no uses other than those to which ordinary nonmagnetic gravel is put, for example, in manufacturing concrete, then it is not an uncommon variety because its unique property gives it no special and distinct value for those uses.

The question is presented as to what is meant by special and distinct value. If a deposit of gravel is claimed to be an uncommon variety but it is used only for the same purposes as ordinary gravel, how is it to be determined whether the deposit in question has a distinct and special value? The only reasonably practical criterion would appear to be whether the material from the deposit commands a higher price in the market place. If the gravel has a unique characteristic but is used only in making concrete and no one is willing to pay more for it than for ordinary gravel, it would be difficult to say that the material has a special and distinct value.

Although appellant emphasizes evidence produced at the hearing showing that construction engineers (of the State of California) and its geologist took samples of the material and tested it, finding it suitable for the construction of highways, tunnels and dams, this evidence, considered with all of the evidence in the record, did not establish that the material on the claim had any special properties which gave the deposit a distinct and special value. Indeed, it is apparent that although it may be superior in some respects to some deposits in the area for certain uses in construction work, it may also be less desirable than other deposits for such work. Nothing was shown which established that it could be used for any purpose for which other commonly available sand and gravel could not be used.

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The weakness of appellant's case is demonstrated by its reliance at the hearing on a letter by the State of California right-of-way agent to a forest ranger dated July 10, 1964 (part of Constestee's Exhibit A, see Tr. 71-72), which stated in part that they:

intend to take principally aggregate base and concrete aggregates and obtain the more common varieties (i.e. aggregate subbage and imported borrow) from closer sites to minimize [sic] our haul costs.

From this appellant insisted at the hearing that the sand and gravel on the claim is not a common variety because of the references to "more common varieties and because the material will be used for concrete aggregates (Tr. 305-306). The State's engineer's comparison of more common varieties" certainly does not categorize this sand and gravel as being an uncommon variety, and in any event, even if it did, his opinion would not be binding when the facts demonstrate otherwise.

His remarks do point out one of the most important factors to a user of sand and gravel and that is its location with respect to the construction site. A closer location would reduce hauling costs. The proximity of appellant's claim to the construction project, together with the availability of a water supply which appellant has shown, should give an economic advantage in selling and processing the materials from the claim over sites which are further away and do not have water. However, no physical property of the material itself has been shown which demonstrates that it has a "special and distinct value." There is nothing to show that the material from the claim may be sold at a significantly higher price than other materials used for the same purposes, which is necessary to demonstrate that it has a property giving it a distinct and special value. *United States v. U.S. Minerals Development Corp., supra; United States v. R. W. Brubaker et al., A-30636 (July 24, 1968)*. Indeed, there is some evidence that it may receive a lower price as Contestant's Exhibit 14, which contains the contract with the State of California referred to by appellant, shows a then-agreed upon royalty of 10 cents per ton. It also contains a contract by the State with others for sand and gravel at a royalty of 50 cents per ton—some 5 times greater than that for appellant's material. In considering all of appellant's contentions with the evidence it is clear that the sand and gravel within this claim is a common variety within the meaning of the act of July 23, 1955, and, hence, the claim is invalid as to the sand and gravel.

The remaining discussion concerns appellant's allegations that because the claim contains some gold it is valid. In its notice of appeal appellant contends that the evidence at the hearing was uncontra-

dicted that the gold on the claim could be mined profitably "if the huge quantities of sand and gravel could be removed from the claim site after processing rather than being stored on the claim which would unnecessarily obstruct the gold recovery operations of the yet unprocessed deposits." However, the "evidence" appellant relies on is the opinion of its witness, a geologist. In considering his testimony in its entirety, together with his report of the examination of the claim, it is apparent that his opinion as to the value of the gold apart from the sand and gravel is based upon unsupported theory as to a means of processing the gold economically from the claim, and further falls back upon a reliance on a sand and gravel operation. Appellant's own contentions are based upon the premise that the placer mining claim is valid for the gold when it is mined in conjunction with operations for the removal of sand and gravel. The information in the record shows, in appellant's words, that the "flour-fine," and also that its values are too low to warrant a mining operation for the gold alone. Appellant refers to testimony by a government witness regarding the value of placer material based upon a report by one of appellant's witnesses (Tr. 300-301); however, this was simply a hypothetical response based upon hypothetical facts (Tr. 299). His evaluation and determination of the value of that witness' samples elsewhere indicated that the values of the gold are too low to warrant development of the claim (Tr. 282-286, 288-290, 298, Ex. 17, 18).

The question relating to the gold pertains to that part of section 3 of the act of July 23, 1955, which provides as follows:

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

This provision refers to the discovery of some locatable mineral such as gold occurring in a deposit of a common variety sand and gravel, etc. Congress certainly did not intend that the presence of any gold within such a deposit would validate the claim, but that there must be a "discovery" of the gold within the meaning of the mining laws. That is, the deposit of gold itself must satisfy the prudent-man test of *Castle v. Womble, supra*. There is nothing in the legislative history of the act which would indicate that this rule would be altered at all. Instead, the fact that the mineral such as gold occurred in a non-locatable deposit of sand and gravel would not invalidate the claim if it was otherwise valid because of the discovery of gold under this standard. However, likewise, the value of the sand and gravel would not be considered in evaluating the value of the gold to determine if there was a valuable deposit of the gold. In other words, as indicated in *United States v. L. N. Basich, A-30017* (September 23, 1964), and

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cases cited therein, there would have to be a discovery of gold which would validate the mining claims independently of the value of the sand and gravel.

It is apparent that the evidence in this case shows that there has not been a discovery of sufficient gold to warrant a prudent man in expending time and money to develop a mine, but at the most would warrant only further exploration in an attempt to locate sufficient gold for mining. A showing of mineral values that are only sufficient to warrant further exploration rather than development work is not sufficient to establish a discovery of a valuable mineral deposit. *Converse v. Udall*,— F. 2d — (No. 21, 697, 9th Cir., August 19, 1968); *C. F. Pruess, Executor v. Udall*, Civ. No. 67-167 (D. Oreg., June 25, 1968).

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

ERNEST F. HOM,  
Assistant Solicitor.

**THELMA M. HOLBROOK ET AL.**

A-30940

*Decided September 30, 1968*

**Oil and Gas Leases; Extensions—Oil and Gas Leases: Drilling**

The post-termination activities of a lessee who claims to have earned an extension of an oil and gas lease by diligently prosecuting actual drilling operations at the end of its primary term can be evaluated to determine whether his activities on the last day of the lease were undertaken in good faith to carry the well-drilling operations to a conclusion and, where it is determined that he was not proceeding in good faith, it is proper to hold that the lease terminated as of the expiration of the primary term.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Mrs. Thelma M. Holbrook, Edward J. Smith, and Elmer J. Smith have appealed to the Secretary of the Interior from a decision dated December 14, 1967, of the Chief, Branch of Mineral Appeals, Office of Appeals and Hearings, Bureau of Land Management, which affirmed a decision of the Wyoming land office holding that oil and gas lease Evanston 021058, of which they are the lessees, had not earned a right to a two-year extension and that as a result it had terminated on January 31, 1967.