

UNITED STATES

v.

FRANK AND WANITA MELLUZZO ET AL.

A-31042

Decided

July 31, 1969.

Mining Claims: Common Varieties of Minerals

Deposits of building stone which are of widespread occurrence and which are used for decorative construction and landscaping only because of the variety of colors in which the stone characteristically occurs are common varieties of stone not subject to mining location after July 23, 1955.

Mining Claims: Common Varieties of Minerals

Mining claims located prior to July 23, 1955, for common varieties of building stone are valid only if they meet all the requirements of the mining laws, including discovery, as of that date.

Rules of Practice: Evidence--Mining Claims: Hearings

In determining whether land on which a building stone claim is located is chiefly valuable for building stone, evidence submitted by the locator on that point may be considered along with evidence by the United States as to the value of the land for other purposes, even though the United States does not submit any direct evidence on the value of the land for building stone.

Mining Claims: Determination of Validity

A building stone claim located on land which has some value for the stone but a greater value for non-mining purposes, even though it is not presently being used for such purposes, is invalid because the land is not chiefly valuable for building stone.

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

Mining claims located for common varieties of building stone will be declared invalid for lack of discovery where the evidence shows that at most small quantities of stone may have been sold from a few claims at an inconsequential profit prior to July 23, 1955, and the claimants declare that they could not make a business of operating any one of the claims.



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

A-31042

United States
v.
Frank Melluzzo and
Wanita Melluzzo
United States
v.
Salvatore Melluzzo and
Concetta Melluzzo
United States
v.
WJM Mining & Development Co., Inc.
United States
v.
Jack R. Cram, Lynn Cram,
Hazen Cram, James Cram, Jr., and
Cram's, Incorporated

: Patent application
: AR - 031156
: Mineral Contest
: Arizona 10591
: Mineral Contest
: Arizona 10592
: Mineral Contests
: Arizona 10593 and 10594
: Mineral Contest
: Arizona 10596
: Mining claims declared
: null and void
: Affirmed

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Frank Melluzzo and others 1/ have appealed to the Secretary of the Interior from a decision dated July 15, 1968, of the Office of Appeals and Hearings, Bureau of Land Management, which affirmed a decision of a hearing examiner holding 23 lode and placer mining claims null and void. 2/

1/ Wanita Melluzzo, Salvatore and Concetta Melluzzo, WJM Mining and Development Co., Inc., Jack R. Cram, Lynn Cram, Hazen Cram, James Cram, Jr., and Cram's Incorporated.

2/ The mining claimants, contest numbers and mining claims are as follows:

Frank Melluzzo	10591	Nita Jean and Nita Jean No. 2
Wanita Melluzzo		placer mining claims (patent application AR-031156)

The claims are in the Phoenix Mountains at the north edge of Phoenix. They are located in two groups, one, consisting of the Nita Jean, Nita Jean No. 2 and Concetta No. 1, lies along 7th Street and is known as the 7th Street group; the others lie about two miles to the southeast and are referred to as the Enterprise group. Some of the Enterprise claims overlap the entire Cram group of claims (contest 10596).

The 7th Street claims were located in July and August of 1954 while the Enterprise claims were located in April 1955, all for building stone. The Cram claims were located between 1928 and 1932 as lode claims valuable for mercury. On March 21, 1964, the locations were amended to building stone placer claims.

After some proceedings involving the Cram group, ^{3/} all the claims were contested on the grounds that the lands within their limits were not chiefly valuable for building stone and that no discovery of a valuable mineral had been made within the limits of the claims prior to July 23, 1955.

Footnote 2 - continued:

Salvatore Melluzzo Concetta Melluzzo	10592	Concetta No. 1 placer mining claim
WJM Mining & Development Co., Inc.	10593	Enterprise Nos. 20 and 21 placer mining claims
	10594	Enterprise Nos. 22 through 30, and 34 placer mining claims
Jack R. Cram, Lynn Cram, Hazen Cram, and James Cram, Jr., and Cram's Incorporated	10596	Copper Bottom, Fox Pass, Franklin Roosevelt, Hiland Queen, North Star, Shamrock, South Side Extension and Sunset lode and placer claims

^{3/} At the opening of the hearing on March 23, 1964, the contestees admitted that there were no lode minerals within the claims but stated that the claims had been amended as placer claims for building stone which had been produced from the dates of original location (Tr. 4-5).

Whether the deposits on the claims are disposable under the mining laws depends upon two statutes. The first, the act of August 4, 1892, 30 U.S.C. § 161 (1964), authorizes the location of building stone claims on "lands that are chiefly valuable for building stone". The second, the act of July 23, 1955, provides in section 3, as amended (43 U.S.C. § 611 (1964)), 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 * * *".

The principles controlling the disposition of mining claims located for building stone are well established. The act of July 23, 1955, removed common varieties of building stone from location under the mining laws. Thus if the stone is a common variety, the appellants in order to satisfy the requirements of discovery must show that as of July 23, 1955, the deposits from each claim could have been extracted, removed, and marketed at a profit. Marketability can be demonstrated by a favorable showing as to such factors as the accessibility of the deposit, bona fides in development, proximity to market, and the existence of a present demand for the material, that is, a demand that existed 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).

If the stone is an uncommon variety, it remains subject to location and the date of discovery can be after July 23, 1955. The claimant must, however, demonstrate that the mineral can meet the marketability test. United States v. Harold Ladd Pierce, 75 I. D. 255, 260 (1968).

Before discussing the pertinent legal principles in greater detail, it will be advisable first to consider generally the nature of the claims.

All of the claims were located originally (or by amendment for the Cram group) for building stone used in the construction of walls, fireplaces, patios, etc. and for general landscaping purposes.

The stone consists mainly of various forms of schists in beds which have been fractured and faulted. They are found in a variety of colors, caused by the weathering of iron oxide, manganese oxide and traces of other elements which occur in varying degrees through the deposits. There is no predictable pattern of colors. Some of the stone consists of rounded or massive boulders which are used for landscaping purposes.

Frank Melluzzo, who gathers stone through employees and sells it to builders, stone masons, and homeowners, stated that he began his stone operation in 1953 or 1954. He said that he uses these and other claims as a source of supply and that he must offer stones of many colors to meet the demand for construction of variegated appearance. He testified that his business is possible because he owns or controls many deposits with a wide variety of colors. 4/

If there is a deposit of an uncommon variety of building stone on each of the claims which meets the requirements of the mining laws, then each of the claims so qualifying is valid and the other issues in the case will be rendered moot. We will examine this aspect of the case first.

The appellants contend that the materials on the claims are not of widespread occurrence. We find, however, that the evidence submitted by the Government establishes that the rocks in the claims are primarily various forms of schist which are found throughout the Phoenix Mountains for 50 to 60 miles around Phoenix (Tr. 69, 70, 74, 250, 1573, Ex. 16). The appellants rely on the testimony of Donald P. McCarthy, a geologist, that less than one thousandth of one percent of the schist in the Phoenix Mountains is salable as decorative stone (Tr. 904). Even if true, this is meaningless in the absence of a total amount to which to apply the percentage. Obviously, .001 percent of millions of tons could be a substantial figure. McCarthy himself estimated that the 15 claims in issue contain 804,675 tons of salable stone (Ex. Y-1), and there is no contention that the claims cover all or most of the schist areas.

The hearing examiner held that the stone was not an uncommon variety because it was used for only the same purposes as other available building stone. The Bureau of Land Management agreed and pointed out

4/ A more detailed exposition of the history of the Melluzzo stone business is set out in United States v. Frank and Wanita Melluzzo, A-30595, decided today.

that the Department has recently concluded that an uncommon variety of stone must possess a unique property and that the unique property must give the stone distinct and special value. For a material that is used for the same purposes as other deposits with which it is being compared, it must make manifest its special qualities by being able to demand a higher price than that at which the comparable deposits are sold. United States v. U. S. Minerals Development Corporation, 75 I.D. 127, 134, 135 (1968).

As pointed out in the Minerals Development case and the other Melluzzo case decided today, fn. 4, the first criterion of an uncommon variety is that the deposit must have a unique physical property. The unique property claimed for the stone here, as well as for the stone in the claims involved in the other Melluzzo case (Renas Nos. 1 to 6) and indeed for practically all the Melluzzo claims, is the varied colors in which the stone occurs. However, variety in coloration appears to be the common attribute of the vast amounts of decorative building stone which can be found in the Phoenix area and elsewhere in the State. And, as pointed out in the other Melluzzo case, the stone is substantially identical with the vari-colored building stone found to be a common variety by the Supreme Court in United States v. Coleman, *supra*. There too it was contended that a number of claims (18) were needed to provide the variety of colors required by the market, and there too the stone was used in walls, patios, etc. for decorative effect. The fact that the Coleman stone was a quartzite whereas the Melluzzo stone is predominantly schist is irrelevant since purchasers from Melluzzo were interested in color, not the geologic classification of the stone (Tr. 778, 868).

Therefore it is concluded that the stone is a common variety which after the act of July 23, 1955, was not locatable under the mining laws.

The contestees, however, contend that because the claims were located before July 23, 1955, they are not subject to the provisions of the act of that date. If the contention is based on the nature of the deposit, the Supreme Court held in United States v. Coleman, *supra*, that building stone is subject to the provisions of section 3 of the act of July 23, 1955. If it rests upon the concept that the claims were located prior to the critical date, then the Department has held that the act is applicable to mining claims located prior to July 23, 1955, but not perfected by discovery prior thereto. Its conclusion has been upheld on judicial review. Clear Gravel Enterprises, Inc., The Dredge Corporation, Inc., A-27967, A-27970 (December 29, 1959), *aff'd*.

Palmer v. Dredge Corporation, 398 F.2d 791, 794-5(9th Cir. 1968), cert. denied, 393 U.S. 1066 (1969); United States v. Charles H. and Oliver M. Henrikson, 70 I.D. 212, 217 (1963), aff'd. Henrikson v. Udall, 229 F.S. 510 (N.D. Calif. 1964), 350 F.2d 949 (9th Cir. 1965), cert. denied, 380 U.S. 940 (1966). Therefore the contestees must show that their claims, since we have found that the deposits on them are common varieties of stone, were validated by discovery and satisfied the other requirements of the mining laws prior to July 23, 1955.

This conclusion, we believe, removes the pertinency from the dispute about whether the Cram group could be relocated from lode to building stone placer after July 23, 1955. Since the stone is a common variety, the Cram claimants must show that the claims were valid prior to the crucial date before any question of amendment can arise. The Melluzzo claims must meet this test, too, and if none of them can, then there is no need to be concerned about an amendment of a claim that would be invalid if it had been originally located in accordance with the intention of the amendment.

The hearing examiner stated that for the claims to be valid it would have to be shown that the lands on which they were located were chiefly valuable for building stone prior to July 23, 1955, and, if they were, that a deposit of stone on each claim was marketable as of July 23, 1955. He then decided that the appraisal of Harvey Smith, a mining engineer witness for the contestees, showed a value of \$37,430 on the entire Melluzzo operation for all his claims and that an apportionment of the production between the two groups of claims in accordance with the testimony gave a value for mining purposes of \$1200 to each of twelve Enterprise claims and not more than \$5600 to each of the 7th Street group claims. He found that the appraisal made by James O. Wyatt, an appraiser employed by the Bureau of Land Management, based on sales for non-mining purposes of similar tracts of land in the vicinity from 1952 to 1955, which placed a value of \$17,000 on the entire 7th Street group and \$58,060 on the entire Enterprise group, was sound. He then concluded that the Enterprise group claims could not be chiefly valuable for building stone in 1955 and were invalid. He went on to analyze in detail the marketing of stone from the 7th Street group to see if production from them had amounted to 750 tons which would have given them in all a value of \$28,000 for mining purposes or \$5,600 per claim. ^{5/} He next

^{5/} He included the Nita Jean Nos. 3 and 4 in his computation although they are not involved in the contest.

reviewed extensively and minutely Melluzzo's testimony in this and other contests and his statements in patent applications and other statements about his production and sales from his various claims. He then stated:

"To summarize briefly the testimony and affirmations made under oath either at hearings or in affidavits filed in connection with patent applications, Mr. Melluzzo stated that he had a ledger made up from sales receipts (Call hearing); that he never had a ledger and that the receipts were reconstructed several years after the events (present hearing); that 75% to 85% of the stone in the Mercer Mortuary, Skyriders Hotel, Caruthers house, and Wurzburger house came from the three 7th Street claims (Call hearing); that the stone in these buildings came from the Deno S claim (patent application); that from 20% to 90% of the stone on these buildings came from the Arizona Placer claim (Hanny hearing); that it came from the Rena group of claims (Rena hearing); and that from 40% to 75% of the stone on these claims came from the three 7th Street claims and the two adjoining claims to the east (present hearing).

"On production Mr. Melluzzo stated that he produced 86 tons and grossed \$300 in 1953 (present hearing); that he grossed \$735 from all claims in 1954 (Call hearing); that he produced 115 tons at \$9.00 a ton for a gross of \$1,035 from the Nita Jean and Nita Jean No. 2 in 1954 (patent application); that he sold 762 tons at \$9 a ton for a gross of \$6858, 40% from 7th Street, 40% from Enterprise group, and 20% from the remainder of his claims in 1954 (present hearing); that he produced and sold 202 tons of stone for \$2800 of which 75% to 85% came from the three 7th Street claims and sold \$2200 of fill material at 20¢ a yard for a gross, before deducting expenses, of \$5000 from all claims in 1955 (Call hearing); that he produced 116/sic; should be 166/tons of stone at \$10 a ton for a total of \$1660 from the Nita Jean and Nita Jean No. 2 in 1955 (patent application); that he produced 160 tons of stone from the Arizona placer claim in 1955 (Hanny hearing); that he produced from 100 to

150 tons of stone from the Rena claims in 1955 (Rena hearing); that he sold stone at the rate of \$15 a ton for a total of \$2816 from the Deno S from June 1955 to September 1956 (patent application); and that he sold 940 tons of stone and traded 2200 yards of fill material to cancel an indebtedness of \$2200 for a net, after deducting expenses, of \$5000 in 1955 (present hearing). Then there are those apocryphal sales receipts that Mr. Melluzzo submitted to the Bureau of Land Management to support his patent application for the two Nita Jean claims which show sales of 30 tons for a gross of \$735 in 1954 and sales of 236 tons for a gross of \$2824 in 1955 (Exh. 26).

"This maze of conflicting testimony all made under oath by Mr. Melluzzo cannot possibly be assembled into a logical or accurate arithmetical finding of fact. In the early 1956 Call hearing he claimed a production in 1955 from all of his claims of 202 tons of stone plus the sale of \$2200 of fill material at 20¢ a ton at a time when fill material across the street was selling at 10¢ a ton, for a gross profit before deducting expenses of \$5000. Now in 1964 at the last and present hearing he claimed a production in 1955 from all of his claims of 950 tons of stone and that he traded 2200 yards of fill material to cancel a \$2200 indebtedness apparently at \$1 a yard for a net profit after deducting expenses of \$5000. At the various hearings Mr. Melluzzo called a number of witnesses who had done business with him and had purchased stone from him in 1954 and 1955, but none could verify any particular tonnage from any one claim.

"In the absence of some specific corroboration I am not convinced that Mr. Melluzzo produced the tonnage he claimed at the present hearing. Since the testimony at the first hearing was closer in time and more likely to be correct, I find that he did not produce more than 75% of 202 tons of stone (151.5 tons) from the three 7th Street claims in 1955. This tonnage is substantially below the amount of production necessary to support the Smith appraisal or a value of \$5600 per claim."

He concluded that none of the land upon which the claims are located was chiefly valuable for building stone in the years 1954 and 1955 and that, accordingly, the claims in the 7th Street group and the Enterprise group and also in the Gram group were invalid.

On appeal the Bureau of Land Management agreed that the land was not chiefly valuable for building stone at the times of location.

The appellants deny the validity of this conclusion and assert that the United States did not present a prima facie case to support its position. They say that Wyatt, the Government witness, testified only as to the non-mining value of the land and made no comparison of it with the value of the land for mining purposes.

Whatever the defects, if any, in the Government's case may have been, the contestees introduced ample evidence on the issue of the mineral value of the lands. Once evidence is submitted, it becomes part of the record and may be and must be used in the disposition of the contest. United States v. Everett Foster et al., 65 I.D. 1, 11 (1958), affirmed Foster v. Seaton, supra.

The contestees also contend that the value placed upon the claims by the Government witness was based upon speculation value, which, they say, is not a present value. This argument is without merit. While the expectation giving substance to the value placed upon the land involved in the comparative sales upon which Wyatt based his appraisal may be the prospect of future demand for the land for residential purposes, the values he used were those reflected in actual current sales of comparable properties in the vicinity of the claims. In other words, he used a present and real value, not a speculative value.

Common experience supports the basis of the Wyatt appraisal. Vacant lots in the downtown section of a city are often used as commercial parking lots pending the construction of an office or other commercial building. It is completely unrealistic to say that the lots are chiefly valuable for parking lots. Or, farm lands come within the influence of rapidly expanding suburbs. It is absurd to say that while the owner continues to farm pending the propitious moment for selling or developing the property for residences or shopping centers the land is chiefly valuable for farming. In both cases it is erroneous to say that until the land is actually used for its most profitable purposes it is chiefly valuable only for its current or interim usage and that its potential value is speculative or nonexistent.

Appellants specifically attack Wyatt's appraisal on the ground that he made it despite knowledge that land adjoining appellants' claims was actually selling for \$15 per acre between 1953 and 1958 (Tr. 528). Appellants ignore Wyatt's effective explanation that the land was sold by the Government as small tracts and not on the open market and that Government appraisals at the time did not reflect fair market value (Tr. 531, 561-562). They also ignore Wyatt's testimony that one small 5-acre tract very close to the Enterprise group was resold on January 21, 1955, for \$1,000, or \$200 per acre (Tr. 560-561).

The appellants object to the refusal of the hearing examiner and the Bureau of Land Management to give much weight to Frank Melluzzo's testimony. The hearing examiner's careful collation and summary of that testimony quoted above fully justifies the lack of credence placed in Melluzzo's most recent version of his early operations. We, too, conclude that Melluzzo produced no more than 75% of 202 tons of stone from the three 7th Street claims in 1955. 6/

The appellants' argument that the Smith appraisal placed a value of \$37,430 on each claim for building stone purposes rather than for all the claims, as the hearing examiner found, misses the point. Smith assigned that value to any claim that was producing 1,000 tons per year (Tr. 949-950) and agreed that a lesser and proportionate value would be given to a claim whose production was smaller than that total (Tr. 967-969, 984-985). As we have just seen, none of the individual claims came close to producing 1,000 tons per year. Smith merely took Melluzzo's estimate of an 800-ton production from all his claims in 1955 and, assuming an increase in production, arrived at a figure of 1,000 tons for the purpose of computing value (Tr. 949-951).

The contestees also urge that the comparative value of the Cram group is to be established as of 1928-1933, the original location dates. Since there is, of course, no evidence that the claims had any value at all for building stone at that time, it is difficult to see how they can be said to have been chiefly valuable for building stone at that time.

In sum, then, we agree with the hearing examiner and the Bureau of Land Management that the value of each of the claims was greater for non-mining purposes than it was for building stone as of the dates they were located and as of July 23, 1955. As a result, each of the claims is invalid because it was located on land that was not chiefly valuable for building stone as required by the act of August 4, 1892, supra.

6/ From the beginning Melluzzo has failed to keep records of his production and sales although his business grew steadily. His apparent dislike for bookkeeping is no reason to give credence to his inconsistent and contradictory recollections over the years.

This conclusion is sufficient to dispose of the appeals and makes unnecessary consideration of the question whether the claims are also invalid because of lack of discovery on each of them, as required by the mining law. However, since the issue has been much discussed, we turn to it. The controlling principles have been stated above. The appellants must show as to each claim that they have found a valuable mineral deposit and that a prudent man would have been justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine on that claim. This requires, especially for a mineral of widespread occurrence, a showing that the mineral from each claim could have been extracted, removed, and marketed at a profit as of July 23, 1955. United States v. Coleman, supra.

The appellants' allegation that all they need show is a general market for the types of building stone on the claims is without merit. The building stone is a mineral of widespread occurrence and each claim based upon it must meet the marketability test as of July 23, 1955. United States v. Coleman, supra.

What is the evidence as to production and sales from each of the 15 claims involved in this proceeding prior to July 23, 1955? As the hearing examiner's decision shows, the evidence is very confusing, inconsistent, and contradictory.

Considering first the evidence as to the 7th Street group, we have already noted that the most acceptable evidence is Melluzzo's testimony at the hearing in the Call case (Ex. 136-A). There he said that he took out \$735 worth of stone in 1954, all from the "Nita Jean, Nita Jean 1" (sic), he "had no other claims" (Ex. 136-A, pp. 98-99). He said that in 1955 he sold around 202 tons for \$2800 from all his claims, including the Last Chance (Nita Jean Nos. 3 and 4) and the Central (Deno S). He first stated that 85 percent came from the Concetta, Nita Jean, and Nita Jean No. 2 and then later said 75 percent. (Ex. 136-A, p. 99; Ex. 136-B, p. 297.) He did not say how much of the 202 tons was produced before July 23, 1955. 75 percent of 202 tons would be 151.5 tons for the entire year. Prorating 151.5 tons on a monthly basis, we would get approximately 88 tons as production prior to July 23, 1955, or 29.4 tons per claim. Although Melluzzo said that he had grossed \$2800, this was inconsistent with his testimony that he was getting \$12 per ton delivered (Ex. 136-A, p. 77), and also with his testimony that he permitted Joe Katich, a buyer, to remove the stone himself. Katich testified that he went to the claims most of the

time to get the stone himself and that he paid \$7 per ton (Ex. 136-A, pp. 38, 45). But assuming the price was \$12 per ton, this meant gross sales from each claim prior to July 23, 1955, of approximately \$360 or about \$51 per month.

We seriously doubt that production of no more than $4\frac{1}{2}$ tons of stone per month, little more than 2 or 3 truckloads, of a gross value of \$51 is sufficient to meet the standard of discovery in the circumstances of this case. Melluzzo testified at the Call hearing that he paid his men \$3 per ton to quarry and stock stone which he sold for \$12 per ton. This would not include the use of his trucks, their operating costs, or other expenses properly allocable to his operation, such as the construction and maintenance of roads. His profit was therefore appreciably less than \$9 per ton. 7/ He did say that the entire \$9 per ton selling price was all profit when someone came and took his own stone. (Ex. 136-B, p. 302.) But even so, it would appear that his profits, at a maximum, ran around \$30 per month or \$1 per day.

We do not believe that this operation satisfies the test of discovery, that it would warrant the issuance of a patent for the 7th Street group. We believe that the evidence shows at best that Melluzzo's stone sales were a small side operation, apart from his principal window-washing business, and that it was, prior to July 23, 1955, merely a means of making a little extra money. Melluzzo did not employ quarrymen until approximately November of 1955 when he hired them on a pay-by-tonnage basis (Ex. 136-B, p. 272). Before that time he worked himself or with his brother or ordered his window cleaners to pick up stone (Ex. 136-B, p. 273; Tr. 1260).

So far we have been discussing only the 7th Street group. When we examine the Enterprise group, we find practically no credible evidence as to production prior to July 23, 1955. We have only Melluzzo's testimony which is inconsistent with and contradictory to his testimony in earlier hearings and statements, as the hearing examiner has well pointed out. Such production as there was amounted to no more than the picking up of an occasional truckload of surface stone from some of the Enterprise claims. The appellants' evidence falls far short of the preponderance of evidence necessary to show a discovery of a valuable mineral deposit on each Enterprise claim.

7/ In the current hearing Melluzzo testified that his profit in 1955 at a \$12 per ton price was \$7 and at a \$9 price was \$4 (Tr. 1258).

Appellants' testimony in another direction points out the lack of a discovery on each claim in issue. Geno Melluzzo testified that their stone business could not have been maintained in 1955 if they did not have all their claims, including not only the ones in issue but also the Rena claims "and many others" (Tr. 370, 372, 373). In fact he said that 40 or 50 percent of their stone in 1953, 1954 and 1955 came from the other claims (Tr. 375-376). Frank Melluzzo testified more positively in the following colloquy with the hearing examiner (Tr. 1517-1519):

"Q. If you owned only the Concetta claim, and no other claims, could you make a business out of the selling of the rock?

A. Out of which?

Q. Could you make a business out of the selling of rock from the one claim?

A. Absolutely not. You couldn't do it.

Q. Is that true in each of the other claims individually?

A. What you would have, you would have a business like, for example, I can show you something that everyone would understand.

You have a grocery store, and you have canned milk, and you have baby food. You might be all right for people that want canned milk and baby food, but I will guarantee you too many people aren't going to buy from your store for just that canned milk or baby food.

They want to come in there and get corn flakes and they want to get oranges and they want to get bananas, and the same way with a mining claim.

Yes, you could operate a business with one claim, but of one variety of stone, and when a man says, "I want red," you are out of business. If he says, "I want blue," you are out of business, and any other color he wants, if you don't have it. He has to go to another stoneyard, and that is what we are having the problem now. That is why I am still today buying stone from other claims, * * *."

Other assertions were made that all the claims are necessary to supply the variety of colors and even shapes that are desired by customers and that business will be lost unless the requests can be met. (Tr. 681, 907, 1115, 1369).

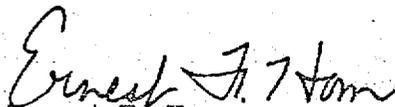
This strongly supports the conclusion that none of the claims in issue can satisfy the test of discovery in that a prudent man would not invest time and money in any one claim with a reasonable prospect of success in developing a valuable deposit.

We refer at this juncture to what a prudent man would do because the ultimate test of discovery is the prudent man rule, that is, the rule that a discovery exists only when minerals have been found in such quantities and of such quality "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." Castle v. Womble, 19 L.D. 455, 457 (1894); United States v. Coleman, supra. The marketability test is but a refinement of that test, albeit it is an essential part of the test. United States v. Coleman, supra. Thus, although it may be argued that a claim literally or technically satisfies the marketability test if it returns a profit of \$1 per day, this will not satisfy the prudent man test if the prudent man will not invest his time and money to develop a deposit for such a meager return. As we have just noted, Melluzzo testified positively and flatly that he could not make a business of selling rock from any one of his claims.

For these reasons we conclude that even if the lands in the claims at issue were chiefly valuable for building stone prior to July 23, 1955, appellants have failed to show by a preponderance of the evidence that any single claim satisfied the test of discovery as of July 23, 1955.

Finally, the contestees allege that they have been denied due process of law. Their contentions are the same as those they made on the same issue in the other Melluzzo case decided today. The contentions are answered in that case.

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 Bureau of Land Management is affirmed.



Ernest F. Horn
Assistant Solicitor
Land Appeals