

Furthermore, the Department is vested with the discretion under the circumstances here presented where the claimants appear to have been misinformed and misunderstood their rights and have improved the land and paid valuable consideration therefor to hold the title in the United States until, "within the limits of existing law or special act of Congress" the several occupants may be enabled to obtain title to the subdivisions to which they hold the color of title and which they occupy. *Williams v. United States* (138 U. S., 514, 524), *Northern Pacific Railway Company v. McComas* (250 U. S., 387, 393). The claimants will therefore be considered as having a preferred right to initiate and perfect title to the land. It is therefore incumbent upon them promptly to seek title to the tracts they claim under appropriate public land laws, it being advisable to state further that should the Land Department determine, as the showings of the applicants suggest, that one or more subdivisions of the land in question is valuable for oil and gas, rights to the same can only be acquired under a permit or lease as the case may require under the provisions of the act of February 25, 1920 (41 Stat., 437), and patent to the land will be issued in such case subject to oil and gas reservation.

In harmony with the views expressed the decision of the Commissioner directing the local officers to note the failure of the location on their records and denying the application for patent is affirmed.

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STEPHEN E. DAY, JR., ET AL.

*Decided May 21, 1924.*

MINING CLAIM—PATENT.

Trap, or trap rock, a general name for dark fine-grained rock, found in broken-up fragments in a limited area, which is particularly suitable and can be profitably marketed for ballast, is, when the land in which it is contained is chiefly valuable for such, a valuable mineral deposit subject to appropriation and patent under the placer-mining laws.

COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED—DEPARTMENTAL DECISIONS DISTINGUISHED.

Cases of *Northern Pacific Railroad Company v. Soderberg* (188 U. S., 526), *Castle v. Womble* (19 L. D., 455), *Pacific Coast Marble Company v. Northern Pacific Railroad Company* (25 L. D., 233), and *Cataract Gold Mining Company* (43 L. D., 243), cited and applied; cases of *Zimmerman v. Brunson* (39 L. D., 310), and *Stanislaus Electric Power Company* (41 L. D., 655), distinguished.

FINNEY, *First Assistant Secretary:*

This is an appeal by Stephen E. Day, jr., *et al.* from the Commissioner's decision of January 7, 1924, holding for rejection their mineral application 033465, filed on September 29, 1923, for the

Radio placer mining claim, embracing lot 8, Sec. 4, and lot 1, Sec. 9, T. 22 S., R. 18 E., S. L. M., Salt Lake City land district, Utah, for the stated reason that trap rock, the deposit claimed and utilized for ballast purposes was not subject to appropriation under the mining laws as a mineral. The Commissioner cited the cases of Stanislaus Electric Power Company (41 L. D., 655), and *Zimmerman v. Brunson* (39 L. D., 310), and stated that the trap rock was on a par with ordinary gravel which could not be entered under the mining laws according to the case last mentioned.

The tracts involved comprise about 44 acres of land just south of the Denver and Rio Grande Railroad track and are situated approximately 14 miles easterly from Green River in eastern Utah. The claim was located in 1922 by Stephen E. Day, jr., and his two associates, who are now the applicants for patent. The location certificate dated November 29, 1922, recited that the claim was upon a valuable deposit of cement gravel. In the application for patent it is alleged that the placer claim bears a superior quality of trap rock suitable and used for ballasting purposes, for which the land is solely and wholly valuable; that the patent work consists of an excavated pit having an average width of 19 feet, 11 feet deep and 540 feet long, valued at \$600; that the mineral deposit referred to covers substantially the whole of the claim which is worthless for any other mineral or for any other purpose and that the soil is desert in character and there are no streams and no timber upon the land. In his affidavit of October 24, 1923, applicant Day avers that no portion of the claim is susceptible of cultivation and that nothing grows thereon except a few desert weeds; that there is disclosed throughout nearly the entire area a deposit of ballast rock many feet in thickness; that about 300 carloads, over 12,000 tons, of ballast rock have been shipped by the claimants through their lessees and used on the main line track of the railroad; and that the ballast is worth ten cents per ton on board the cars at the pit.

Since the appeal was taken counsel has been heard orally and additional evidence has been submitted. In a duly corroborated affidavit executed by said Day on March 25, 1924, it is alleged that the trap rock deposit has already been extracted to a depth of about 11 feet and extends indefinitely below so far as he can determine; that, excepting the patented Lorna Doone claim of 100 acres on the west and the Radio placer, there is, so far as affiant is informed, very little, if any, land containing the deposit; that immediately west of the Lorna Doone claim is a solid rock formation different entirely from the deposit here in question; that on the south line of the two claims the deposit thins out to such an extent as to render it valueless and that the extent of the deposit conforms to the basin in which

the claims were located and probably covers only a few acres outside the limits of the two locations. It is stated that the proximity of the railroad and the transcontinental highways affords an available market for the deposit. In a corroborating affidavit dated April 2, 1924, it is averred that the deposit is not in a solid formation but is in a loose, broken-up condition rendering crushing unnecessary.

It appears that trap, or trap rock, is a general name for dark, fine-grained igneous rocks, particularly lavas or dikes. See Glossary, Bureau of Mines, Bulletin 95. The Department understands that the deposit referred to as gravel consists of loose, broken-up fragments of hard rock particularly suitable for, and actually used as, ballast on the railroad.

The proof furnished indicates that the available deposit is practically limited to the area of the two claims mentioned. The Lorna Doone claim was entered in 1909 and patented in 1910. The favorable report of the special agent upon that claim showed that it covered a gravel deposit from which good track ballast was obtained and had no other value. The single question presented in this case is whether the deposit described constitutes a valuable mineral deposit within the purview of the mining statute.

In the case of Pacific Coast Marble Company *v.* Northern Pacific Railroad Company (25 L. D., 233) it was held (syllabus):

Whatever is recognized as a mineral by the standard authorities, whether of metallic or other substances, when found in the public lands in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, must be treated as coming within the purview of the mining laws.

In the case of Northern Pacific Railroad Company *v.* Soderberg (188 U. S., 526, 536) the Supreme Court said that the overwhelming weight of authority was to the effect that mineral lands include all such as are chiefly valuable for their deposits of a mineral character which are useful in the arts or valuable for purposes of manufacture. In that case a deposit of granite was involved upon which a quarry had been opened.

The decision in the case of the Cataract Gold Mining Company (43 L. D., 248, 254) pointed out that in the Stanislaus case it was found that the stone had no commercial value and could not be transported and marketed at a profit, and after restating the principle set forth in *Castle v. Womble* (19 L. D., 455) the Department said:

The mineral deposit must be a "valuable" one; such a mineral deposit as can probably be worked profitably; for otherwise there would be no inducement or incentive for the mineral claimant to remove the minerals from the ground and place the same in the market, the evident intent and purpose of the mining laws.

It may be noted that in the Stanislaus case (41 L. D., 655) the application purported to be for a deposit of building stone specifically located and sought under the act of August 4, 1892 (27 Stat., 348). The stone was a low-grade granite, widely distributed, and possessed no particular value as a building stone. The land itself constituted a valuable power site and was being utilized for hydroelectric purposes. It was held that the land was not chiefly valuable for building stone, as was required by said act of 1892 in order to be subject to location and patent thereunder as a building-stone placer. In the course of that opinion the following appears, on page 660:

Furthermore, it is the undoubted purpose, intent, and scope of the mining laws to reserve from other disposition and to devote to mineral sale and exploitation only such lands as possess mineral deposits of special or peculiar value in trade, commerce, manufacture, science, or the arts.

The deposit upon the Radio placer and the adjoining claim is limited in extent and according to the showing is confined to the two claims. It is being excavated and utilized. It has a royalty value of 10 cents per ton of rock removed. The land possesses a positive value for the trap rock. The claim is not sought under the provisions of the building stone act or for any purpose other than the extraction of the trap rock. In these several respects the Stanislaus case is to be distinguished and is not controlling here.

In the Zimmerman-Brunson case a deposit of ordinary gravel and sand was involved. The deposit possessed no special or peculiar property or characteristic and its chief value was due to its proximity to a town. It had been used for making concrete and concrete blocks for building construction. The Department declined to classify as mineral land containing such a deposit and sustained the homestead entry made thereon. The ruling in that case is not deemed necessarily determinative of the present question.

This trap rock is something different from ordinary gravel. As the Department understands, it consists of a deposit in a loose and broken up state, the rock fragments being peculiarly adapted for railroad ballast and for road metal. In utility it is the equivalent of crushed rock. Upon both the Radio placer and the adjoining patented claim the deposit has been worked and utilized. It has been found to be desirable and valuable and particularly adapted to the use for which it has been employed. The deposit is limited in area.

The claim was apparently located in entire good faith. The original locators are the applicants for patent. The location and patenting of the Lorna Doone claim may have induced the location of the Radio placer. There is no ulterior motive or hidden purpose back of these applicants. The use made of the tracts is clearly the sole and only use for which they are suited or valuable. Under the circumstances and conditions disclosed the Department is of the opinion

that the deposit of trap rock is demonstrated to be a valuable mineral deposit within the meaning and intent of the general mining laws and as such is subject to appropriation and patent as a placer mining claim.

In the Commissioner's decision a conflict as to lot 1, said Sec. 9, is noted between the placer application and application 033447, filed September 26, 1923, for an oil and gas prospecting permit. The permit application embracing said lot 1 and other tracts was filed by Walter J. Ward three days prior to the placer application which was accompanied by a protest against the former. As the Radio placer claim is held herein to be a valid location made long prior to the presentation of the permit application, the tract in conflict will upon due notice to said Ward, be eliminated from his application.

The appeal herein is sustained. The mineral application, all else being regular, will be allowed to proceed to entry and patent. The decision of the Commissioner is reversed.

### LETNIK OIL ASSOCIATION v. DAVIS ET AL.

*Decided May 21, 1924.*

#### OIL AND GAS LANDS—PROSPECTING PERMIT—NOTICE—PREFERENCE RIGHT—STATUTES.

The provision in section 13 of the act of February 25, 1920, which gives a preference right to an oil and gas prospecting permit for six months following the marking and posting of notice upon lands in Alaska, is to be construed to mean for six calendar months thereafter, and that the time shall expire at the close of an official day of the local office in the sixth month following posting which corresponds to the date of posting, unless such day does not occur in the sixth month, in which event the last day of that month will mark the expiration of the preference right period.

#### OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION—ASSIGNMENT.

While the Department will refuse to approve the assignment of a mere application for an oil and gas prospecting permit, yet it may recognize, in connection with such application, persons who desire to become associated with the permittee in development of the land, and, in such event, will issue a permit to the applicant and his associates, if they be qualified.

#### COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of Daley v. Anderson (48 Pac., 839), Daly v. Concordia Fire Insurance Company (65 Pac., 416), and United States v. Omdahl (25 L. D., 157), cited and applied.

#### FINNEY, *First Assistant Secretary:*

The Letnik Oil Association, composed of Albert L. Carlton, Harry J. Heuver, Thomas H. Morton, Fred R. Lucas, William E. Sullivan, Alfred Nelson, Helen E. Wentworth, F. J. Stewart, and