

Editor's note: 79 I.D. 379.

UNITED STATES

v.

RICHARD M. LEASE

IBLA 70-416

Decided May 10, 1972

Appeal from decision by hearing examiner Graydon E. Holt declaring placer mining claim to be null and void.

Affirmed.

Mining Claims: Common Varieties of Minerals: Generally -- Mining
Claims: Common Varieties of Minerals: Special Value

Dolomite which can only be used as aggregate in road construction, ground cover, leach lines and other purposes for which common varieties of sand, stone and gravel may be used must be considered a common variety under section 3 of the Act of July 23, 1955, unless it can be shown to have a unique property giving it a special and distinct value as reflected by a substantially higher commercial value for the dolomite than other materials used for the same purposes.

6 IBLA 11

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

Although a deposit of dolomite may be considered an uncommon variety within section 3 of the Act of July 23, 1955, if suitable for metallurgical use, the prudent man test of Castle v. Womble, as complemented by the "marketability at a profit" test, must be satisfied to sustain a placer mining claim for the deposit.

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

If a deposit of dolomite is locatable under the mining laws only because it can be used for metallurgical and other uses for which common varieties of sand, stone, gravel, etc. cannot be used and has no property giving it a special and distinct value otherwise, the sales of the dolomite for purposes for which common varieties of materials can be used cannot be considered to establish the marketability at a profit and value of the deposit for the metallurgical and other uncommon variety uses.

Administrative Procedure: Burden of Proof -- Mining Claims:
Contests -- Mining Claims: Discovery: Marketability -- Rules
of Practice: Government Contests

In a Government contest against a mining claim where the Government has shown that the small market for dolomite useful for metallurgical purposes is being met by more competitive sources than the claim, the contestee then has the burden of proof to show by a preponderance of the evidence that the dolomite could be marketed at a profit for such purposes.

Mining Claims: Contests -- Mining Claims: Discovery: Generally

A mining claim for dolomite is properly declared null and void where it is concluded that there was not a sufficient market for metallurgical and other uncommon variety uses for the dolomite to justify the costs of mining the claim solely for such uses.

APPEARANCES: Fred H. Almy, attorney for appellant. Charles F. Lawrence, Office of General Counsel, U.S. Department of Agriculture, attorney for appellee.

OPINION BY MRS. THOMPSON

This appeal by Richard M. Lease is from a decision by hearing examiner Graydon E. Holt, dated October 20, 1969, declaring Lease's Sharpless Dolomite No. 1 placer mining claim to be null and void for lack of discovery of a valuable mineral deposit. 1/

This claim contains 160 acres in section 7, T. 2 N., R. 1 E., S.B.M., California, within the San Bernardino National Forest and approximately one mile north of Big Bear Lake. It was located July 2, 1957, by eight locators. Following mesne conveyances, appellant acquired the claim by a quitclaim deed dated January 1, 1964 (Ex. 5). 2/

In 1965 a contest against the claim was initiated by the Forest Service, United States Department of Agriculture, charging that a discovery of locatable minerals had not been made within the claim or any of its subdivisions, that the land is nonmineral in character,

1/ The appeal was made to the Director, Bureau of Land Management. However, jurisdiction over appeals to the Director, as well as appeals to the Secretary of Interior, was transferred to this Board effective July 1, 1970. 35 F.R. 10012.

2/ In this decision, exhibits produced at the hearing may be cited by the number or letters there given as "Ex. ____". The transcripts of the hearings shall be cited as "I Tr. ____" for the first hearing held November 4, 1965, and "II Tr. ____" for the second hearing held March 13, 1969.

and that the land is not chiefly valuable for building stone. In a previous decision dated April 1, 1966, hearing examiner Holt declared the claim to be null and void for lack of discovery of a valuable mineral deposit under the mining laws. He found the material allegedly giving validity to the claim, dolomite, to be a material of widespread occurrence used by the contestee for purposes for which common varieties of sand or stone could be used, and thus a common variety of material within the meaning of section 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1970). He also found the contestee failed to show that the deposit of dolomite was marketable for uses for which common varieties of sand and stone would not be suitable.

From the hearing examiner's decision of April 1, 1966, Lease appealed to the Director, Bureau of Land Management, requesting a further hearing to show that the dolomite was marketable for metallurgical purposes. This request was granted by the, then, Bureau's Office of Appeals and Hearings in its decision of October 10, 1968. The present appeal arises from the hearing examiner's decision upon the rehearing. In his decision of October 20, 1969, the hearing examiner ruled expressly that whether the dolomite deposit is a valuable mineral deposit under the mining laws depends upon whether there is a sufficient market for it in the metallurgical and chemical industries to justify an extraction and processing operation. He refused to consider the profitability of the mining operation for uses for which

common varieties of materials were readily available as an element in determining the profitability of the dolomite for the uncommon variety purposes. As to the facts he concluded as follows:

From the evidence in the present case it is clear that a successful operation of this claim requires a production of 10,000 tons or more a year, that this volume can and has been produced and sold profitably, that during the last year of operation approximately 16,000 tons of dolomite was [sic] processed and sold, that 90% of this production was used for purposes in which common variety materials can be used and 10% for metallurgical purposes, and that there is a possibility of increasing the sales for this latter use. However, there was insufficient evidence to justify a finding that there is a present or potential future market for 10,000 tons a year of the material for use in the metallurgical, chemical, or pharmaceutical industries. In the absence of sufficient evidence to justify such a finding it must be concluded that the dolomite on the claim does not constitute a valuable mineral deposit under the present mining laws.

Appellant contends generally that the dolomite material is an uncommon variety and the only question in this appeal is whether it has been and can be mined and sold at a profit. Appellant asserts that it has been and can be sold for metallurgical purposes at a greater profit than for nonmetallurgical purposes, except that the development of the market for metallurgical use has been difficult because of Governmental litigation against the claim.

Because this claim was located after the Act of July 23, 1955, it can be sustained only if the dolomite material for which it is allegedly valuable is not a common variety of material under that Act. The Act removed common varieties of sand, stone, etc. from the operation of the mining laws. As appellant states in this appeal, at the time of the first hearing (November 4, 1965):

the evidence disclosed that the rock extracted to the date of hearing had been utilized almost exclusively for the same purposes of aggregate, etc. for which other widely dispersed and easily available sands and gravels were similarly used.

Ordinarily if a mineral product can only be used for the same purposes for which widely available common varieties of sand, stone, gravel, etc. may be used, it must also be considered a common variety unless it can be shown to have a unique property giving it a special and distinct value as reflected by a substantially higher commercial value for the product. United States v. Norman Rogers, A-31049 (March 3, 1970); United States v. Paul M. Thomas et al., 78 I.D. 5, 1 IBLA 209 (1971). There is no evidence in this case that the dolomite has any unique property giving it a special and distinct value for use as aggregate in road construction, ground cover, leach lines, and the other purposes for which common varieties of sand, stone, etc. may be used. It does not meet the test of being an uncommon variety for those uses.

A deposit of stone may also be considered an uncommon variety within the meaning of the Act of July 23, 1955, if it has physical properties giving it a special and distinct value for uses for which common varieties of sand, stone, etc. may not be used. Id. It was assumed in the hearing examiner's decision that the dolomite within this claim may be used for uncommon variety metallurgical purposes. We do not dispute this assumption. For a detailed discussion of the grade requirements and qualities for limestone products, including dolomite, to meet metallurgical and chemical standards see United States v. Chas. Pfizer & Co., Inc., 76 I.D. 331 (1969) (a request for reconsideration of certain aspects of this case is under advisement by this Board). Assuming then that some of the deposit of dolomite may be an uncommon variety because it meets the standards for metallurgical uses, 3/ we reach the issue suggested by appellant as to its marketability.

As appellant concedes, although a deposit may be considered an uncommon variety within the meaning of section 3 of the Act of July 23, 1955, the validity of the claim then depends upon whether there has

3/ This assumption would only pertain to such 10-acre tracts on the claim which have been excavated and mined as the evidence did not clearly show that the material would meet metallurgical or chemical standards throughout the 160 acres. See 43 CFR 3842.1-3 and 1-4 (1972).

been a discovery of a "valuable mineral deposit" within the meaning of the general mining laws (30 U.S.C. § 22 et seq. (1970)). This determination is made by applying the prudent man test of Castle v. Womble, 19 L.D. 455 (1894), as complemented by the "marketability at a profit" test approved in United States et al. v. Coleman et al., 390 U.S. 599 (1968). United States v. Albert B. Bartlett et al., 78 I.D. 173, 2 IBLA 274 (1971). This test requires evidence that the material from the claims is marketable at a profit so as to justify a prudent man in reasonably expecting that by expending further time and money a valuable mine may be developed on the claim. The test applies to this dolomite deposit.

The crucial question raised in this case is whether in applying the test here we must consider those profits which have been or may be attained from selling the material for the purposes for which common varieties of materials concededly may be used in order to determine the value of the deposit as a locatable uncommon variety material. In other words, did the hearing examiner in applying the marketability and prudent man test correctly differentiate between sales of the dolomite for metallurgical uses and sales of the material for the common variety uses?

Although appellant alleges there is a difference in profitability between sales of the dolomite for the metallurgical use and the common variety uses, he also apparently relies on the sales of the dolomite for common variety uses to show that the claim can be mined profitably. This is reflected by his contention that since the mineral is dolomite and there is "no subordinate or lesser included deposit within the dolomite," this case is distinguishable from United States v. Mt. Pinos Development Corp., 75 I.D. 320 (1968). That case held that the value of a gold deposit must be established independently of the profits which could be anticipated from the sale of the ambient common varieties of sand and gravel. The rationale of that case is that the value of the deposit of mineral which remains locatable under the mining laws since the Act of July 23, 1955, must be determined independently of the value of the deposit for other purposes. In that case the distinction was made between a metallic mineral and a non-metallic, common variety mineral product no longer locatable under the mining laws since the Act of July 23, 1955. In United States v. Chas. Pfizer, *supra*, at 348-49, a similar distinction was made between limestone materials of varying qualities. The following discussion in that case is of interest:

In determining whether a discovery has been made * * *, the critical consideration is whether a discovery has been made only of the uncommon

variety of limestone on the claim. No consideration can be given to the value of the common variety of limestone that may exist on the claim even though that limestone may be marketable at a profit today. This is self-evident for since July 23, 1955, only an uncommon variety of limestone has been subject to mining location and it must stand on its own feet so far as discovery is concerned, unaided by its association with a common variety. It cannot ride piggy-back, as it were, on the shoulders of a common variety. See United States v. Frank Melluzzo et al., 70 I.D. 184 (1963); cf. United States v. Mt. Pinos Development Corp., 75 I.D. 320 (1968). Thus the common limestone on the claims must be treated like the other worthless rock on the claims in evaluating whether a discovery has been made of the uncommon limestone.

To put it more concretely, suppose that a 99 percent carbonate rock is so evenly intermingled with a No. 4 80 percent carbonate rock that in order to obtain one ton of the 99 percent rock it is necessary to mine two tons of the intermingled material. Suppose that mining costs are \$3 per ton so that it costs \$6 to extract the 2 tons of mixed material. Suppose further that the 99 percent rock sells for \$5.50 per ton and the No. 4 rock at \$1.50 per ton. Obviously it would be unprofitable to spend \$6 to produce \$5.50 worth of 99 percent rock, whereas it would be profitable if the \$1.50 return for the No. 4 material could be counted in. This is plainly impermissible, however, for it is tantamount to saying that the discovery of a locatable mineral, insufficient in itself, can be perfected by a discovery of a nonlocatable mineral on the claim. [Footnote omitted] Thus, in our example, the intermingled No. 4 rock must be treated as if it were a granite or other worthless rock. To hold otherwise would be to permit the easy frustration of the Congressional intent to bar location of common varieties after July 23, 1955.

We believe that the rationale in the distinction in United States v. Mt. Pinos Development Corp., *supra*, and United States v. Chas. Pfizer & Co., Inc., *supra*, between the sale of the locatable and nonlocatable mineral products applies with equal force here to the sales of the dolomite for common variety purposes and uncommon variety purposes. This conclusion is supported by the language quoted above from United States v. Chas. Pfizer & Co., Inc., and is reinforced by the legislative history of section 3 of the Act of July 23, 1955. In discussing the language in section 3 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," the House Committee on Interior and Insular Affairs stated that this language "would exclude materials such as limestone, gypsum, etc. commercially valuable because of 'distinct and special' properties." H.R. Rep. No. 730, 84th Cong., 1st Sess. 9 (1955). The Senate Committee on Interior and Insular Affairs stated that:

[The] language is intended to exclude from disposal under the Materials Act [now 30 U.S.C. § 601 (1970)] materials that are commercially valuable because of "distinct and special" properties, such as, for example, limestone suitable for use in the production of cement, metallurgical or chemical-grade limestone, gypsum, and the like. S. Rep. No. 554, 84th Cong., 1st Sess. 8 (1955).

The language in both of these reports emphasizes the value of the limestone, for example, because of "distinct and special" properties making it useful for special commercial purposes. This emphasis is echoed in the Departmental regulation defining common varieties and uncommon varieties, as follows:

(b) "Common varieties" includes 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. 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 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. Limestone suitable for use in the production of cement, metallurgical or chemical grade limestone, gypsum, and the like are not "common varieties." This subsection does not relieve a claimant from any requirements of the mining laws. [Emphasis added] 43 CFR 3711.1(b), 35 F.R. 9731 (formerly 43 CFR 3511.1(b)).

The penultimate sentence of the regulation sets forth the specific commercial uses mentioned in the Senate Report, classifying limestone "and the like" of metallurgical or chemical grade as an uncommon variety. The regulation thus reflects the recognition and distinction manifested in the legislative history of section 3 of the Act of July 23, 1955, between common and uncommon varieties because of special values for particular, special commercial uses. The last sentence of the regulation makes it clear that the requirements of the mining laws must be met. Therefore, it is obvious that even though a material may fall within the special classification made in the regulation, the requirements of the prudent man and marketability tests would still have to be satisfied to sustain a claim having a deposit deemed an uncommon variety.

From the legislative history of the Act and the language in the regulation it appears to have been contemplated that only the value of the product for an uncommon variety use which removes the mineral product from the category of common varieties would make the deposit of the product commercially valuable. Of course, a mineral product intrinsically may have commercial value, yet, the mineral deposit may not be mined profitably because of economic factors such as the prohibitive costs of the mining operation compared with the market

place price. A claim for such a deposit could not be sustained. See, e.g., Adams v. United States, 318 F.2d 861, 870 (9th Cir. 1963); United States v. Estate of Alvis F. Denison, 76 I.D. 233 (1969).

In view of the distinction between common and uncommon varieties in the Act, its legislative history, and the regulation as to the type of commercial use value contemplated for the mineral product, section 3 of the Act, expressly providing that no deposit of common varieties "shall be deemed a valuable mineral deposit within the meaning of the mining laws", would be negated if we were to hold that sales of the dolomite for common variety purposes could be used to make the mineral deposit valuable within the meaning of the mining laws. The purposes of the Act are served by holding that we will not look to sales for common variety purposes in order to determine the profitability of a mining operation for an uncommon variety of stone. This holding is in accord with other determinations as to what factors may be used in determining whether or not a mineral deposit is valuable. For instance, it is obvious that in determining whether a profitable mining operation can be anticipated to satisfy the prudent man test, we cannot look to other values upon a claim, such as the value of the sale of timber therefrom. We have indicated that under the rule in United States v. Mt. Pinos Development Corp., supra, the value of a gold deposit may not be determined by considering

the sale of common varieties of ambient sand and gravel. Also, in United States v. Chas. Pfizer & Co., Inc., supra, the value of an uncommon variety high grade limestone deposit may not be determined by adding the value of the common variety of limestone.

Therefore, if a deposit of an uncommon variety of material may not be profitably sold for the uses for which it allegedly has a special value, we conclude that it may not be deemed to be a valuable mineral deposit under the mining laws although it may be sold for common variety uses; cf. United States v. Harold Ladd Pierce, 75 I.D. 255 (1968) ^{4/} and United States v. Harold Ladd Pierce, 75 I.D. 270 (1968); thus, a claim for such a deposit is invalid.

^{4/} The following statement in this opinion, at 75 I.D. 260, expressly supports this conclusion.

"Even though we assume that the deposit of limestone may be classified as an uncommon variety, the mining claim based upon it must satisfy the requirements of the mining law. One of these as we have seen, is that there must be a present profitable market for the deposit. It must be a market based either upon the use making the limestone an uncommon variety (United States v. E. M. Johnson et al., A-30191 (April 2, 1965)) or upon the use of the limestone for the same purpose that a common variety of limestone would be used for, but in the latter event the limestone would have to possess a unique value for such use which would be reflected in a higher price for the limestone than a common variety would command (United States v. U.S. Minerals Development Corporation, 75 I.D. 127 (1968))." * * *

Since we conclude that the hearing examiner correctly differentiated between sales of the dolomite here for common variety and uncommon variety purposes, the remaining question is whether his finding that the marketability test for the uncommon variety uses of the dolomite was not met is supported by the evidence.

In reviewing the record, it is apparent that at the time of the first hearing there was insufficient evidence to show that the dolomite on the claims was then marketable at a profit solely for metallurgical or other allegedly uncommon variety purposes. Until marketability at a profit could be established, the claim could not be considered as having been validated by a discovery of a valuable mineral deposit. 5/ United States v. Coleman, supra.

5/ If the evidence were to show satisfactorily that marketability at a profit was established after the first hearing was held in 1965, another problem would arise in this case because the claim contains 160 acres and appellant acquired his interest in the claim in 1964. The mining laws limit the acreage which may be located in a single placer claim to 20 acres for an individual or to a maximum of 160 acres for an association of 8 individuals (30 U.S.C. §§ 35, 36 (1970)). Therefore, although the association of 8 individuals in this case could locate a claim for 160 acres, unless a discovery was perfected prior to transfer of the claim to a single individual, he would only be entitled to perfect 20 acres of the claim. United States ex rel. United States Borax Co. v. Ickes, 98 F.2d 271 (D.C. Cir. 1938); Bakersfield Fuel and Oil Company, 39 L.D. 460 (1911); H. H. Yard et al., 38 L.D. 59 (1909). This problem is only noted as our disposition of this case makes the resolution of this problem as to appellant unnecessary.

The record at the second hearing further shows that most of the attempts to sell the material for metallurgical uses and to establish a market for other uncommon variety purposes were made after the first hearing. Appellant's lessee, D. E. Hayes, testified that he made only two sales for metallurgical purposes prior to the first hearing and none thereafter except through a sales agent, Brumley-Donaldson (II Tr. 90). Most of those sales apparently are reflected in exhibits L and 16, discussed further, infra. The claim was under the control of Big Bear Rock & Materials Company for a time following the first hearing and Hayes testified that approximately 2 or 3 loads a month (a load being approximately 25 tons (II Tr. 3,4)) were shipped into the Los Angeles market for metallurgical purposes by that company (II Tr. 3,4). Another operator, Owl Rock Products, shipped 312 tons for metallurgical fluxing use (II Tr. 3,4). The records of these transactions were not available, however.

Most of the information concerning sales of the material from the claim for metallurgical purposes was during 1968. More detailed information was also furnished concerning sales for non-metallurgical purposes during that year. Appellant's contention that the development of a market for uncommon variety purposes was thwarted because of court action does not hold up when we examine the facts, as will be seen infra. As shown by exhibit N-3, the United States District Court, Central District of California, in a

proceeding, United States v. Richard M. Lease, et al., Civil No. 67-1687-F, on January 25, 1968, enjoined Lease, Hayes, and other named defendants from removing material in excess of 10,000 tons per year beginning January 1, 1968, and prescribed certain conditions to protect the surface of the claim. This order was modified April 10, 1968 (Ex. N-2), requiring further protective measures for slope stabilization to prevent erosion and other surface damage, but no change was made as to the amount of material that could be removed. On July 9, 1968, the court found that appellant's lessee had failed to take slope stabilization measures and otherwise failed to comply with the previous orders, and, therefore, ordered the defendants to cease operations until further order of the court.

These facts as to the court action in this case may be compared with those in Barrows v. Hicke, 447 F.2d 80 (9th Cir. 1971), where all mining operations for sand and gravel were prohibited by a court injunction although exploration was allowed. In response to a contention that the injunction prevented a showing of continued marketability and thus automatically invalidated the claim, the court found the contention to be meritless. It stated at 84:

* * * Although the temporary injunction previously entered by the District Court prevented any mining activities by appellants during the pendency of this appeal, we held in an earlier decision that the loss of a market for the

sand and gravel resulting from the injunction could not be permitted to prejudice appellants' asserted rights to the Grout Creek claim. United States v. Barrows, 404 F.2d 749; 752 (9th Cir. 1968), cert. den., 394 U.S. 974 (1969).

In the present case, appellant was not completely prevented from removing material from the claim until he failed to comply with the court's orders for protecting the surface. Until then he could have removed a sufficient amount of material to establish its marketability for uncommon variety purposes.

Appellant contends that the hearing examiner's finding that there is an insufficient market for the dolomite for metallurgical uses is not supported and relies on testimony by a Government witness. The testimony was to the effect that the Los Angeles area market, where appellant might be competitive because of accessibility, needed only a total of approximately 10,000 tons a year of carbonate rock and most of this was being met by sales of limestone for foundry purposes, with additional uses by steel companies whose supplies are being met more competitively from other sources (see II Tr. 101-108). This testimony was adequate to establish prima facie that there was little market for the material and what market existed was being met from other sources. The burden of proof was then upon the contestee to show by a preponderance of

the evidence that the dolomite could be marketed at a profit for uncommon variety purposes. Cf. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). This burden has not been met.

Much of appellant's own evidence supports the testimony of the Forest Service's witness on marketability and, indeed, raises a question as to whether the dolomite meets industrial standards for some of the uncommon variety purposes for which appellant alleges it is valuable. 6/

Although the record shows that attempts were made prior to 1968 to market the dolomite from the claim for glassmaking or other special industrial purposes, nothing shows that such attempts were successful or economically feasible.

6/ For example, appellant contends that the material is suitable for use by steel companies in making steel. However, each steel company has certain specifications for limestone and dolomite products. Exhibit P-2 is a letter of June 23, 1966, from the Kaiser Steel Corporation to Hayes' company, Tri-City Concrete, stating that it uses only 700 to 800 tons per month of raw dolomite sized 5/8" x 1/8", and was already satisfied with its present source unless Hayes' product was equal to or better than that source and could be delivered at a lower cost. Although exhibit P-1 is Hayes' reply stating he believed his dolomite met the requirements and could be delivered to Kaiser at Fontana, California, for \$6.20 per ton less a discount of 20 cents per ton, "10th proximo", there is no evidence that any dolomite was ever sold to Kaiser. Kaiser had specified 33-35% CaO, 20 plus % MgO, and SiO₂ minus 1%. Exhibit 17 submitted by appellant's witness shows an analysis of crushed dolomite of the size Kaiser specified of 30.2% CaO, MgO 20.0%, and SiO₂ 1.1%. This would not meet Kaiser's specifications without upgrading. None of the other analyses of the dolomite in the record meets Kaiser's specifications.

The real crux of appellant's contention that he profitably marketed and sold dolomite from the claims and at a higher profit than the sales for the common variety purposes is based upon exhibit L, an alleged summary of the tonnages and profits from the sales of dolomite during the period the court injunction was in effect in 1968. He contends that this summary, after certain computations are made, demonstrates that the sales for metallurgical purposes produced 13 percent of the net income with only 10 percent of the tonnage sold for such purposes.

The hearing examiner, at n. 2 in his decision, indicated that after making corrections in the errors in the computations and deducting the delivery cost from the metallurgical income category, which was just shown as income, the percentage of production and income from metallurgical sales amounts to approximately 10 percent. The hearing examiner's corrections are supported by the record and we believe his conclusion is more accurate than appellant's computations. However, we have found so many errors in computations and in assumptions with respect to exhibit L, that little, if any weight, can be given to the alleged summary and what it purports to show. ^{7/} In our analysis of the evidence (see the discussion in note 7), we

^{7/} The errors corrected by the hearing examiner by reference to invoice records would change the tonnage shown for metallurgical sales from 1,040.24 to 1,139.14 tons and the stated metallurgical

find that except for a few sales which approximated or were 13 cents more than the average price received for the nonmetallurgical sales and one sale approximately \$2.23 more per ton, the price for the metallurgical sales, after hauling charges are subtracted, was approximately 23 to 37 cents less than the average nonmetallurgical sales price.

fn. 7 (cont.)

gross income from \$7,927.85 to \$7,575.99. This figure does not reflect the hauling costs. At \$3.85 per ton for hauling subtracted from this figure, the alleged net income (actually, gross receipts) for metallurgical sales would be \$3,190.31. This would average \$2.80 alleged net profit (actually, gross price) per ton. With hauling costs computed at \$4 per ton, as the record indicates many were, the average figure would be reduced to \$2.65. This is closer to the figures testified to by contestee's witness in subtracting the hauling charges from the gross price received for the metallurgical sales, where most sales reflected a net of \$2.50 to \$2.65, with a few later sales netting f.o.b. mine price around \$2.85 to \$3 a ton and one sale netting \$5 a ton (see II Tr. 50, 61).

Exhibit L shows the gross tonnage for all sales as 10,702.07. However, our addition of the figures shown in that column totals 14,302.07. This would make the percentage of sales for metallurgical purposes to be nearly 8 percent rather than the nearly 10 percent shown on the exhibit.

We must also question the accuracy of the gross income shown on exhibit L. Appellant concedes that, at the hearing, it was brought out that this figure included the price of the metallurgical sales, including the hauling costs. If we subtract the metallurgical gross sales price of \$7,575.99 from the \$36,302.70 total gross income shown on the exhibit, we get \$28,726.71 alleged net profit (actually, gross receipts) from nonmetallurgical sales. This figure divided by the 13,162.83 tonnage figure for such sales (achieved by subtracting our corrected metallurgical tonnage from the corrected gross tonnage) would result in an average \$2.18 price per ton for the nonmetallurgical sales. This figure is much too low when we compare it with the other evidence in the record by appellant's witnesses as to the prices received from the nonmetallurgical sales. Although exhibit L purports to contain a summation of sales

Appellant contends there is no requirement in meeting the prudent man test that the sale of the dolomite for metallurgical purposes be more profitable than for nonmetallurgical purposes. Neither did the hearing examiner; nor do we establish such a rule. This evaluation of the evidence concerning all of the sales of the material is important only for determining whether or not the claim can be profitably mined for the dolomite for its use for uncommon variety purposes apart from the profit that may be attained in selling the material for the common variety purposes. In any event, it is apparent, contrary to appellant's contentions, that the claim has been more profitable for its sales for purposes other than the metallurgical sales. It is significant in light of his contentions concerning the effect of the court order, that even after the order limited the tonnage to be removed from the claim, only approximately 8 percent of the tonnage removed was sold for metallurgical purposes rather than nonmetallurgical purposes (see note 7). This belies those contentions.

fn. 7 (cont.)

not shown on exhibit 16 (a copy of sales records from the claim from January 1968 through June 1968), the bulk of the nonmetallurgical sales should be reflected on that exhibit. Our computation of the figures shown on exhibit 16 reflects an average of approximately \$2.87 per ton price, f.o.b. the mine, received for nonmetallurgical sales during that period.

Exhibit L is also misleading because it does not show a true net income figure, but actually shows only gross receipts. An evaluation of the costs of the mining operation with expected returns from the sale of the locatable mineral is proper to determine whether a prudent man would expect to develop a valuable mine. Adams v. United States, supra. No allocation has been made on exhibit L for any costs for the equipment and labor in making the dolomite saleable in the sizes desired by the customer. Hayes, appellant's lessee, testified that as of December 1967 he had made a total investment of \$80,000 on the claim (II Tr. 89). He also stated in an affidavit that the equipment on the claim, "six continuous belt conveyors, 3 sand and gravel screens, a tort [?] table, a primary crushing plant, an electric generating plant and other attached equipment", had a fair market value in excess of \$50,000. This did not include a 2 cubic yard Lorain power skiploader and hand tools also used (II Tr. 100). The amortization of this equipment and labor costs would obviously establish a far different income from that given in exhibit L.

Appellant does not dispute the hearing examiner's finding that there must be at least 10,000 tons of material produced from the claim to justify a mining operation. This finding is supported in the record. For example, Hayes testified that a mining operation

removing 10,000 tons would be borderline (Tr. 35). The record does not show that appellant could market that amount for uncommon variety purposes or meet all the costs of the mining operation by such sales.

To conclude, the evidence shows that there was ample opportunity for the claimant to establish the marketability of the dolomite for uncommon variety purposes. Although there was some showing that the dolomite could be marketed for metallurgical uses, the evidence shows that it could not be marketed at a profit solely for such uses. As United States v. Coleman, *supra*, indicates, profitability is important in applying the prudent man test. We find the hearing examiner correctly concluded that there was not a discovery of a valuable mineral deposit locatable under the mining laws, and properly declared the claim to be null and void.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the hearing examiner's decision is affirmed.

Joan B. Thompson, Member

We concur:

Martin Ritvo, Member

Edward W. Stuebing, Member

