

UNITED STATES

v.

BYRON N. GARDNER ET AL.

IBLA 72-410

Decided January 30, 1974

Appeal from a decision by Administrative Law Judge L. K. Luoma 1/ in Arizona contests 1342, 1343 and 1344 declaring appellant's three mining claims null and void.

Affirmed as modified.

Mining Claims: Generally--Act of August 4, 1892

The Act of August 4, 1892, 27 Stat. 348, 30 U.S.C. § 161 (1970),  
authorizes the entry of lands chiefly valuable for building stone under  
the provisions of law in relation to placer mineral claims, and such

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1/ The title of the hearing officer has been changed from "Hearing Examiner" to "Administrative Law Judge." 38 F.R. 10939, May 3, 1973, effective August 19, 1972.

entry may be made regardless of the form in which the deposits are found.

Mining Claims: Generally--Act of August 4,  
1892--Words and Phrases

"Building stone, chiefly valuable for." Building stone as used in the Act of August 4, 1892, 30 U.S.C. § 161 (1970), includes stone used for building, for structural work and for other similar commercial purposes, but land chiefly valuable for the supply of stone to be manufactured into artifacts is not chiefly valuable for building stone under the Act.

Mining Claims: Discovery: Marketability

To constitute a valid discovery upon a mining claim there must be shown to exist, within the limits of the claim, a deposit of minerals in such quality and quantity as would warrant a prudent man in expending his labor and means with a reasonable

prospect of success in developing a valuable mine.

#### Mining Claims: Determination of Validity

Where a mining claimant has located a number of claims, he must show a discovery on each claim to satisfy the requirements of the mining law as to that claim.

APPEARANCES: Bryon N. Gardner, pro se, and on behalf of appellants; 2/ Richard L. Fowler, Esq., Office of the General Counsel, U.S. Department of Agriculture, Albuquerque, New Mexico, for appellee.

#### OPINION BY MR. GOSS

Appellants have appealed from a decision by Administrative Law Judge L. K. Luoma dated March 30, 1972, declaring null and void their three mining claims--the Unique Onyx placer, the Hazel D #1 lode and the Unique Onyx #1 placer--located within the Coconino National Forest, Coconino County, Arizona. The claims were located

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2/ Notice of appeal was filed by Byron N. Gardner, presumably representing himself, Eleanor Gardner and Cecil Goodwin. (Tr. 2.) Appellants' "argument and evidence" filed June 1, 1972, recites that it is filed for "Unique Onyx Placer Mining Claims Association."

after July 23, 1955. The Judge determined inter alia that the mineral deposits on the claims in contest did not meet the test of uncommonness and, therefore, the deposits were not subject to location under the general mining law after the passage of the Act of July 23, 1955, as amended, 30 U.S.C. § 611 (1970). The Board does not reach the question of whether the stone is a common variety under section 611.

#### Unique Onyx Placer Claim

The Government charged that the Unique Onyx placer claim had been improperly located as a placer. At the hearing, the mineral deposit on such claim and the deposit on the Hazel D #1 lode were described by Gilbert J. Matthews, a Forest Service mining engineer, as lode deposits. (Tr. 126-28.) Appellant Gardner also agreed that such was the nature of the deposits. (Tr. 177.) The Judge found that the deposits on the claims were lode deposits and concluded that for such reason the Unique Onyx placer claim was not subject to location as a placer.

While stone from the claim has been sold for fireplace rock, fireplace slabs and as rubble for plastic table tops, appellants have found that it is more profitable to manufacture the stone into such artifacts as clocks, pen sets, bookends and ashtrays. (Tr. 27-29, 162.) Appellants are in the process of phasing out

the selling of rough material and are concentrating on the selling of finished products. (Tr. 162.)

Appellants argue on appeal that under 36 CFR 251.4 and the Act of August 4, 1892 (27 Stat. 348), 30 U.S.C. § 161 (1970), the Unique Onyx placer claim was correctly located as a placer claim. Section 251.4 is not applicable for it pertains to disposal of materials not subject to disposal under the mining laws. The Act authorizes placer locations of lands "chiefly valuable for building stone," irrespective of the form in which the deposits occur. 1 American Law of Mining, § 5.21 (1968). Section 1 of the Act provides in part:

That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims: Provided, That lands reserved for the benefit of the public schools or donated to any State shall not be subject to entry under this act.

Appellants assert they were informed by an attorney and the Forest Service that a deposit of building stone should be located as a placer. Appellants were justified in acting upon the asserted information only if the lands embraced by the Unique Onyx placer were "chiefly valuable for building stone."

The Supreme Court in Cole v. Ralph, 252 U.S. 286, 295 (1920), stated:

\* \* \* But to sustain a lode location the discovery must be of a vein or lode of rock in place bearing valuable mineral \* \* \* and to sustain a placer location it must be of some other form of valuable mineral deposit \* \* \*. A placer discovery will not sustain a lode location, nor a lode discovery a placer location. \* \* \*

Appellants' pleadings did not allege that the lands embraced by his Unique Onyx Placer Claim were chiefly valuable for building stone and, hence, properly locatable as a placer. The Government presented a prima facie case that the claimed discovery was of a lode or vein. The burden was, therefore, upon appellants to allege and show by affirmative defense that under section 161 the placer claim is chiefly valuable for building stone.

In A Dictionary of Mining, Mineral, and Related Terms, U.S. Bureau of Mines (1967) at 149, the term "building stone" is defined to be:

a. Any stone used in masonry construction, generally stone of superior quality that is quarried and trimmed or cut into regular blocks. A.G.I. Supp. b. Includes all stones for ordinary masonry construction, ornamentation, roofing, and flagging. Countless different kinds of rocks are used. Practically all varieties of igneous, sedimentary, and metamorphic rocks are included, but a few varieties stand out prominently because of their durability and widespread occurrence. In its broader sense, the term includes stone in any

form that constitutes a part of a structure; however, cut or rough-hewn blocks for exterior walls are most widely used. Stokes and Varnes, 1955.

When appellants' stone is used for construction of fireplaces, it is used as building stone but when used for artifacts it is not used as building stone. <sup>3/</sup> The two values for the stone herein concerned may be compared to the value of a lode of valuable mineral ore. While such ore may have a value as a building stone or as fill, it is most valuable for the mineral therein; hence, such a lode may not be located as a placer building stone claim. In the case of the Unique Onyx placer claim, the evidence shows the land is chiefly valuable not for building stone, but for the supply of stone to be manufactured into artifacts. Because the record discloses (Tr. 128, 177) that the deposits on the Unique Onyx placer

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<sup>3/</sup> Under McGlenn v. Wienbroeër, 15 L.D. 370, 374 (1892), land which contains a deposit of stone that is not only useful for general building purposes but is also valuable for the ornamentation of buildings, for monuments and other commercial purposes may be entered as a placer claim. The Department has also stated in Stanislaus Electric Power Co., 41 L.D. 655, 660 (1912), that the Act of August 4, 1892:

"\* \* \* was intended to and does apply only to deposits of stone of special or peculiar value for structural work, such as the erection of houses, office buildings, and such other recognized commercial uses as demand and will secure the profitable extraction and marketing of the product. \* \* \*"

While stone used in the erection of houses and for other general building purposes is clearly building stone, the two cases indicate that stone used for certain other commercial purposes may also be considered as building stone. It must be presumed, however, that the words "chiefly" and "building" were included in the Act in order to fulfill a Congressional purpose. Because of the limitations of the statute, the words "other commercial purposes" and "recognized commercial uses" in the two decisions must necessarily relate to the use of the stone for construction of various structures.

and the Hazel D #1 lode were lode deposits, such claims could properly be located only as lode claims. Cole v. Ralph, *supra*. Therefore, we must hold that the Unique Onyx placer claim is invalid because it was not subject to location as a placer.

#### Hazel D #1 Lode Claim

As to the Hazel D #1 lode, its validity depends on the showing of a discovery of a valuable mineral deposit within the limits of such claim.

The tests for determining whether such a discovery has been made are the prudent man rule and the marketability test. The prudent man rule was first laid down by the Department in Castle v. Womble, 19 L.D. 455, 457 (1894) in which it was stated:

\* \* \* [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. \* \* \*

The rule has been approved a number of times by the Supreme Court of the United States, most recently in Coleman v. United States, 390 U.S. 599 (1968). That case also approved the complementary test to the prudent man rule, the so-called marketability test. The Court stated in Coleman at 600, 602:

\* \* \* The Secretary of the Interior held that to qualify as "valuable mineral deposits" under 30 U.S.C. § 22 it must be shown that the mineral can be "extracted, removed and marketed at a profit"--the so-called "marketability test."

\* \* \* \* \*

\* \* \* Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes. The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent-man test, and the marketability test which the Secretary has used here merely recognizes this fact. (Footnotes omitted.)

Matthews examined the Hazel D #1 lode claim in 1964 and 1966, and he observed it in 1971.

(Tr. 19-20.) He testified that there was only one area, termed a crevasse, in which travertine was exposed on the Hazel D #1 lode. (Tr. 49, 92.) When questioned as to his opinion on whether there was a discovery of mineral on each of the claims which would justify a prudent man in expending his time and money with a reasonable prospect of success in developing a paying mine, he stated that the easily accessible stone had been removed and that more costly mining would now be entailed. (Tr. 77-78.)

At the hearing appellants presented samples of their "unique onyx;" however, apparently none were taken from the Hazel D #1 lode.

(Tr. 129.) While appellants introduced evidence relating to sales of stone and profits made from such sales, there was no breakdown of such figures as they related to any individual claim.

The law is clear that there must be a discovery on each claim and a mining claimant must show as to each claim that he has found a mineral deposit which satisfies the tests for discovery. United States v. Bunkowski, 5 IBLA 102, 79 I.D. 43 (1972), modified in 13 IBLA 256 (1973).

Appellants herein did not offer any evidence as to the amount or nature of the mineral deposit on the Hazel D #1. The evidence submitted was of a general nature relating, apparently, to all the claims. It is not enough to offer evidence for the claims as a unit. United States v. Block, 12 IBLA 393, 80 I.D. 571 (1973).

We find that appellants have failed to show a discovery of a valuable mineral deposit on the Hazel D #1 lode claim, and for that reason the claim is null and void.

#### Unique Onyx #1 Placer Claim

Appellant Bryon Gardner admitted that no mining activity had taken place on the Unique Onyx #1 placer claim. (Tr. 179.) The Judge found the claim was invalid because there was no exposure of

the claimed valuable travertine-onyx within the boundaries of the claim. (Tr. 65-66.) We agree with that finding.

Appellants' other arguments have been reviewed and are found not to warrant reversal of the decision below.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

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Joseph W. Goss, Member

We concur:

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Frederick Fishman, Member

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Edward W. Stuebing, Member

