

Editor's note: 88 I.D. 925; Appealed -- aff'd, Civ.No. 82-2112 (C.D.Cal. Oct. 30, 1984)

UNITED STATES
v.
RICHARD P. HASKINS

IBLA 78-190

Decided October 21, 1981

Appeal from a decision of Administrative Law Judge Michael L. Morehouse declaring the Haskins Quarries placer mining claim valid and recommending issuance of patent. CA-2755.

Appeal reviewed de novo; decision below reversed; claim held null and void.

1. Mining Claims: Lode Claims

To constitute discovery upon a lode mining claim, there must be exposed within the limits of the claim a vein or lode of quartz or other rock in place, bearing gold or some other mineral deposit in such quality and quantity which would warrant a prudent man in the expenditure of his time and money with a reasonable prospect of success in developing a valuable mine.

2. Mining Claims: Placer Claims

A placer mining claim has been defined as ground that includes valuable deposits not in place, that is, not fixed in rock, but which are in a loose state.

3. Mining Claims: Placer Claims -- Act of August 4, 1892

Under provisions of the Act of Aug. 4, 1892, 30 U.S.C. § 161 (1976), known as the Building Stone Act, land chiefly valuable for building stone can only be entered by mining claims in the placer form regardless of the actual mode of occurrence of the deposit.

4. Mining Claims: Location -- Mining Claims: Lode Claims -- Mining Claims: Placer Claims -- Act of August 4, 1892

While deposits of limestone chiefly valuable for building stone were subject to location only as placer claims, deposits of limestone valuable for their chemical or metallurgical properties are properly located according to the form of their deposition.

5. Mining Claims: Possessory Right

Under the provisions of 30 U.S.C. § 38 (1976), the holding and working of a claim for the period of time equal to the State's statute of limitations is the legal equivalent of proofs of acts of location, recording, and transfer. This provision does not, however, alter other requirements of the mining laws, such as the necessity of a discovery or limitations on acreage which may be taken up in a claim.

6. Mining Claims: Possessory Right

The requirements of 30 U.S.C. § 38 (1976), relating to "holding" and "working" a claim may be met where the assessment work requirements have been met and where there is actual possession or occupancy of the claim.

7. Mining Claims: Discovery: Marketability -- Act of August 4, 1892

Land may be considered "chiefly valuable for building stone" where the building stone values of the mineral deposit sought are greater than any other mineral values or nonmineral values for which the land may be appropriated.
8. Mining Claims: Placer Claims -- Mining Claims: Possessory Right

Nothing in 30 U.S.C. § 38 (1976) alters the requirement limiting each individual claimant to 20 acres per location. Thus, for a single possessory claim of 85 acres to be sustained, it must be shown that five individuals held and worked the claim for the requisite period of time.
9. Administrative Authority: Estoppel -- Administrative practice -- Rules of Practice: Generally

Where a party, in the course of various proceedings before the Department, asserts facts that would, if proven, entitle him or her to obtain patent to land owned by the United States, and the litigation proceeds on the assumption that the facts are as stated, appellant will not be heard in a subsequent hearing to deny that those facts existed.
10. Mining Claims: Millsites -- Mining Claims: Possessory Right

Since millsites may only be located on nonmineral land, a millsite claim is necessarily adverse to a mining claim. Thus, land embraced by a millsite claim is not open to the initiation of rights under 30 U.S.C. § 38 (1976).
11. Mining Claims: Location -- Mining Claims: Placer Claims

All placer claims must conform "as near as practicable" with the system of

rectangular public land surveys. Where a claim does not so conform and it is not possible to amend the claim so that it does, the entry must be canceled.

12. Mining Claims: Assessment Work -- Mining Claims: Withdrawn Land

Failure to substantially comply with the requirements to annually perform assessment work on a claim which is located on withdrawn land results in a forfeiture of that claim to the United States.

13. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment -- Mining Claims: Abandonment -- Mining Claims: Possessory Right

The recordation provisions of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), applies to claims which rely on the provision of 30 U.S.C. § 38 (1976) to prove location and posting. Where such claims have not been duly recorded, they are a nullity.

APPEARANCES: Charles F. Lawrence, Esq., Office of the General Counsel, Department of Agriculture, for the Government; Hale C. Tognoni, Esq., Phoenix, Arizona, for appellee.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Administrative Law Judge Michael L. Morehouse, by decision dated December 30, 1977, found the Haskins Quarries placer mining claim to be supported by a discovery and recommended the issuance of a patent. The Government has appealed this finding to the Board.

The history of this claim is both long and convoluted, with Departmental adjudication already stretching over half of a century, intermittently punctuated by Federal Court review. A thorough knowledge of this history is, unfortunately, essential to both understanding and determining the present appeal. Accordingly, this history will be set out in detail.

The lands embraced within the confines of the Haskins Quarries patent application were originally subject to four lode and two millsite claims. ^{1/} The four lode claims were known as the Lone Jack, Lap Wing, Roger Williams, and Lady Helen while the two millsites were referred to as the Lap Wing and Lady Helen.

The Lone Jack was originally located on January 10, 1894, by Frederick A. Lovell. On February 28, 1907, Tessie Cooke-Haskins located the Lap Wing. This was followed by the location of the Roger Williams by Richard P. Haskins, husband of Tessie Cooke-Haskins, together with Frederick A. Lovell and Francis H. Clark on January 2, 1909. The Lady Helen mining claim was also located on January 2, 1908, by Frederick A. Lovell and Francis H. Clark. Later that year, on November 14, 1908, Tessie Cooke-Haskins located the Lap Wing millsite, which was followed the next year by the location on November 10, 1909, of the Lady Helen millsite by Richard P. Haskins.

^{1/} The land involved, aggregating approximately 85.1 acres of land, is located in secs. 27 and 28, T. 3 N., R. 14 W., San Bernardino meridian, approximately 3 miles north of the Los Angeles city limits and is situated in the Angeles National Forest. Actually, not all of the original Roger Williams is included within the limits of the Haskins Quarries claim.

The strike of the four mining claims was generally northwest by southeast. The Lap Wing was the southernmost claim. The Lone Jack abutted the Lap Wing on the north. The Lady Helen was adjacent to the west of the Lone Jack, with some area of the Lady Helen also abutting the west sideline of the Lap Wing, while the Roger Williams was adjacent to the west side of the Lady Helen. The Lap Wing millsite was in the shape of an irregular pentagon, with one side adjacent to the south portion of the east sideline of the Lap Wing mining claim. The Lady Helen millsite, in rectangular form, abutted the Lap Wing millsite along its northeastern boundary.

As noted above, Tessie Cooke-Haskins was the sole locator of both the Lap Wing mining claim and Lap Wing millsite, while Richard P. Haskins was the sole locator of the Lady Helen millsite. Full title to the Lone Jack mining claim was apparently acquired by Richard P. Haskins through quitclaim deeds in 1907 from Frederick A. Lovell and one Carrie L. Simmons. ^{2/} On January 15, 1918, Richard P. Haskins quitclaimed the Lone Jack mining claim to his wife. Richard P. Haskins acquired full title to the Roger Williams and Lady Helen lode mining claims from Francis H. Clark and Frederick A. Lovell in 1908.

In 1928, the area embraced by the claim was withdrawn from location and entry by section 1 of the Act of May 29, 1928, 45 Stat. 956, known as the Watershed Withdrawal Act. Section 2 of that Act provided

^{2/} The quitclaim deed given by Carrie L. Simmons granted Haskins all rights and privileges running from another claim, named the "Mammoth" claim, located on Oct. 5, 1906, which overlapped the Lone Jack claim.

that "this Act shall not defeat or affect any lawful right which has already attached under the mining laws and which is hereafter maintained in accordance with such laws."

Richard P. Haskins died the following year, and his wife, Tessie Cooke-Haskins, subsequently made application for patent of the Lone Jack and Lap Wing lode claims, together with the Lap Wing millsite. ^{3/} In her application, filed August 15, 1929, Tessie Cooke-Haskins alleged a discovery of gold and vanadium. By letter of January 6, 1930, the District Forester of the Angeles National Forest filed a protest with the Register of the land office requesting cancellation of the mining locations for lack of discovery and because the land thereby embraced was nonmineral in character, and also seeking invalidation of the millsite for nonuse for mining and milling purposes. On January 9, 1930, the Department caused a complaint to issue against the patent application based on the grounds alleged by the District Forester. An answer was duly filed and a hearing was set before the Register. ^{4/}

^{3/} The mineral survey, No. 5902 A and B, which accompanied the application for patent listed improvements on the Lone Jack as a discovery tunnel valued at \$720 and three cuts and tunnels with a total value of \$1,899. The improvements on the Lap Wing noted the existence of a discovery point with no value accorded it, and a tunnel with an assessed value of \$1,820. The total value of labor and improvements on the two mining claims was estimated to be \$4,439. The survey also recorded three cabins, a storehouse, and a blacksmith shop on the millsite.

^{4/} Until United States v. O'Leary, 63 I.D. 341 (1956), hearings in mining contests were held before the Register and, subsequently, the land office manager upon the abolition of the position of Register. In O'Leary, the Department decided that the strictures of the Administrative Procedure Act applied to mining claim contest hearings and that such hearings must therefore be before someone appointed under the provisions of 5 U.S.C. § 3105 (1976).

The hearing was held on November 21, 1930. While the thrust of this hearing dealt with the question of the existence of gold, silver, and vanadium within the limits of the claims, there was testimony relating to dolomitic limestone deposits located both on these two claims and on the adjacent Lady Helen claim. ^{5/} The Government mining engineer, William H. Friedhoff, noted that a lime kiln existed behind one of the houses on the millsite (1930 Tr. 10). The engineer testified that there was a "dolomitic lens in this just to the west of these claims that has apparently either folded into the gneiss with the gneiss or has faulted in here, this is on a claim west of the Lone Jack, I believe" (1930 Tr. 11-12). In response to a question relating to the existence of a cut in the lime rock, the engineer stated:

Fifty feet north west of the north west corner of the Lapwing there is a quarry face in impure dolomitic limestone thirty feet wide; extends about thirty feet north where it is cut off by granite and gneiss; probably lenticular; a fault is on the adjacent claim; dolomite was hauled from here and there is a large pile near the road.

(1930 Tr. 12).

While there was a clear agreement on the existence of the lime kiln, Tessie Cooke-Haskins testified that it was presently being used

^{5/} There are a total of four separate hearings involved in this case. One occurred in 1930 and another in 1933 relating to the Lone Jack, Lap Wing, and Lap Wing millsite. These are found in exhibit G-4. The third hearing arose as a contest of a verified statement filed pursuant to the provisions of section 5 of the Surface Resources Act, Act of July 23, 1955, 69 Stat. 369, 30 U.S.C. § 613 (1976). The fourth hearing was held by Judge Morehouse in 1977, which hearing related to the instant placer claim. For convenience, citations to transcript will be by the year of the hearing followed by the page of that transcript. Thus, a citation to the initial hearing will be "1930 Tr. ."

as a storage area (1930 Tr. 24, 35). She testified as to a number of sales of lime rock. See 1930 Tr. 26-29. The following colloquy then ensued:

Q. Do you know the uses this lime rock is put to?

A. Yes.

Q. What are some of them?

A. The American Legion Building in Pasadena has floors made of it; it has been used for roofing paper; I understand for fluxing but I don't know much about that but I have sold quite a bit of it for that use for mining and golf courses; they used quite a lot for ornamental purposes.

Q. Do they use it for building activities?

A. Yes; plaster.

(1930) Tr. 29). In all, she testified that about 1,000 tons of lime rock had been sold from the claims at issue. In response to a question of where exactly the rock was removed she answered, "practically from the creek up the hill" (1930 Tr. 34).

Frederick A. Lovell, the original locator of the Lone Jack, also testified on behalf of Haskins.

In reference to a request that he describe the formation which passed through the Lone Jack and Lap Wing claims the following discussion occurred:

Q. What is it?

A. Why the west walls; the west side of that ground is lime formation.

Q. What is the east side?

A. It would be granite.

Q. What would you call the intruded or the vein; the so called vein matter?

A. Well, highly mineralized roscolite [sic] schist.

Q. How wide is that vein matter?

A. Well possibly three or four hundred feet; probably six hundred; between the main granite walls and the lime; I would figure about that.

(1930) Tr. 43-44).

Jesse A. Tiffany, who had purchased some of the lime rock and was a graduate chemist, also testified on behalf of Haskins. He stated that in 1922 he had approached Richard Haskins and taken a lease on the lime rock deposit.

A. There was the lime rock on the Lapwing at that time has not been opened up; previous work in the lime rock had been to pick up wash float in the canon that came from adjoining properties.

Q. Did you open up the lime rock deposit under this contract?

A. Yes. sir.

Q. Was there any lime rock removed?

A. Yes, sir; we removed quite a bit of lime rock from just above the tunnel on the present location of the Lapwing.

Q. What method was used in getting this rock out?

A. We removed the overburden on it; then blasted it out in places; broke it up and rolled it into the gulch below.

Q. It was a solid formation?

A. Yes; it was a very large body of crystallized lime rock.

Q. What disposition was made of that lime rock?

A. We brought it down to the plant on San Fernando Road and broke it up and ground part of it for grit; chicken grit; a great deal of it was broken into gravel for this mosaic terrazzo and sold to contractors that were using it for the construction of various buildings in the city.

(1930 Tr. 53-54).

Tiffany stated that he removed between 500 and 600 tons of rock at that time. While he stated that a reasonably prudent man would be justified in expending money on the claim, he noted that it would take a considerable investment, as a large plant would be necessary (1930 Tr. 55). When asked what he would develop he stated:

A. Gold; silver; platinum; vanadium.

Q. Is that all?

A. That is all.

* * * * *

Q. You would not figure anything on the lime that is on the claim?

A. I think most of it has been removed since that time.

Q. Most of the lime has been removed?

A. I believe so.

(1930 Tr. 55-56).

A number of miners also testified on behalf of the claimant. Jesse Barnes, a miner with 40 years experience, testified:

Q. Are you familiar with the formation of the Lapwing and Lone Jack lode claims?

A. I call it lime on one side and altered granite on the other side.

Q. On which side is lime?

A. On the west side.

Q. Does that lime extend for any great length?

A. Cuts right through the country there.

Q. And that lime is in place; is it?

A. Yes, sir, it goes right through there; you can trace it right through on the surface outcrops.

Q. What width is the vein between the altered granite and the lime?

A. In some places a couple of hundred feet thick where it crops out; I should judge.

(1930 Tr. 65).

Similarly, T. A. Hamilton, a miner with 30 years experience, stated:

I went over the formation there I would judge somewhere between one hundred and fifty and two hundred feet of mineral zone; on one side of the mineral zone on the west side carries the lime belt following through there; opens out; crops out every once in a while then goes in and comes out on top of the ridge.

(1930 Tr. 71). Hamilton noted that the lime was very good lime which he had used in fluxing, but indicated that he was primarily interested in it to the extent that it formed a wall for the porphyry 6/ (1930 Tr. 74).

The Register, in a decision dated April 25, 1931, held for the claimant on the basis of a discovery of gold, silver, and vanadium. No value was accorded to the lime deposits about which a number of individuals had testified, as set forth, infra. An appeal was taken from this decision to the Commissioner of the General Land Office.

By decision of February 5, 1932, the Commissioner reversed the decision of the Register. Of relevance herein, the Commissioner made the following statement:

As to the limestone there is no evidence in the record that the limestone said to occur on the Lap Wing claim is in vein or lode formation and one of contestee's witnesses testified that the supply was about exhausted. Contestee testified that the deposit of limestone was about 50 feet west of the tunnel on that claim. As the tunnel is only a short distance from the west line of the claim, even if any portion of the deposit remains, it must be largely outside the limits of the claims upon contestee's own testimony, whereas Friedhoff testified that the only limestone in the vicinity is west of the claim. When all of the facts are considered, it is not possible to hold that the Lap Wing claim is of potential value for its limestone content or

6/ We would note that Friedhoff, in rebuttal, denied that any porphyritic, iron-stained quartz was disclosed, declaring that the belt was granitic gneiss with schist indications. He further argued that there was no limestone within the limits of the two claims (1930 Tr. 81-82).

that the limestone, assuming its presence, is locatable as a vein or lode.

(Los Angeles 047535 "N" CRB at 11-12).

Tessie Cooke-Haskins thereupon appealed the decision of the Commissioner to the Secretary of the Interior. On appeal to the Secretary, Haskins directly argued that the limestone was in vein formation. See Brief and Argument, filed April 4, 1932, at 2. With her brief and argument appellant submitted a report prepared by one Ralph S. Baverstock, relating to an examination of the two claims, as well as the Lady Helen, directed at analyzing the dolomitic limestone. The report noted that "footwall formation is feldspathic granite -- hanging wall gneiss and granite."

In his decision of June 6, 1932, the Assistant Secretary noted that the evidence was conflicting as to whether a commercial lode deposit of limestone was disclosed on the two claims. Thus, the Assistant Secretary held that the Forest Service had not met its burden of showing no discovery. ^{7/} On the other hand, the Assistant Secretary, noting that a patent application had been filed, held that the claimant had failed to "affirmatively show" that within each claim there existed

^{7/} It should be remembered that prior to United States v. Strauss, 59 I.D. 129 (1945), Government mining contests had generally proceeded with the United States bearing the ultimate burden of proof. In Strauss, however, the Department held that once the Government makes a prima facie case of no discovery, the burden then shifts to the claimant to overcome this showing. This procedure received judicial approval as being in accord with the Administrative Procedure Act in Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).

a limestone deposit such as probably could successfully be mined at a profit. Absent such showing no patent would issue. Accordingly, the case was remanded to the Register, to afford claimant the opportunity to establish her entitlement to patent.

A rehearing was subsequently held before the Register on November 13, 1933. Unlike the 1930 hearing, this second hearing focused almost totally on the presence or absence of a commercial deposit of limestone. Claimant's first witness was Ralph S. Baverstock. Baverstock testified as to his onsite inspection of the Lone Jack and Lap Wing claims. He stated that he found an outcrop of lime rock approximately 25 feet in width and 150 feet in length, dipping to the east within the west line of the Lone Jack, which was the claim at the top of the mountain (1933 Tr. 2). He also stated he found an "outcrop" in the Lap Wing on the south side of the gulch at the foot of the hill.

Baverstock testified that he was sure that the outcroppings occurred within the limits of the two claims, and then addressed the question of form of deposition:

Q. Do these deposits exist as ledges or veins, or lenses, or how would you describe them?

A. I would describe them as lenticular deposits.

Q. And they are in place, or as distinguished from float?

A. They are most decidedly in place.

(1933 Tr. 5).

This testimony as to the nature of the deposit was corroborated by a geologist, Ellis Mallery, who had extensive experience with limestone deposits. He stated that the deposits "are lenses or masses of the limestone in the surrounding rock under a common occurrence" (1933 Tr. 10). He noted that the deposit was also found on the Lady Helen claim to the west, noting "I am stressing the continuity of the vein from a geological standpoint, the vein was strong and a lot of limestone there" (1933 Tr. 16). He also noted that the deposit was high grade refractory (1933 Tr. 17).

Tessie Cooke-Haskins testified as to the quarrying and marketing of limestone from the claims. Because of the importance of this testimony we will set it out at some length. In response to a question relating to the removal and marketing of the lime rock, she stated:

A. [Tessie Cooke-Haskins] For a couple of months in the latter part of 1920 my husband was negotiating with several parties to try to work the limerock and they started a pit twenty feet from the west side line and two hundred feet from the north end line of the Lapwing and seventy five feet south of the Lapwing tunnel.

Q. Do you know how much material was removed from that pit or cut?

A. Eighteen hundred tons.

Q. On the Lapwing?

A. On the Lapwing, during several years.

Q. And that removal began about what time did you say?

A. 1921, they started work in 1920.

Q. How much of it has been removed, has there been any removed recently?

A. From the cut that is now open I would say about fifteen tons.

Mr. Dechant, Is that the same cut?

A. No sir.

By Mr. Hintze,

Q. Now what happened to that cut that was originally on the Lapwing claim?

A. It was worked for several years and a cloud burst covered it up.

Q. Is there any evidence on the surface showing this cut at this time?

A. No sir.

Q. Now what was done with the limerock that was taken from the Lapwing claim at that time?

A. Part of it is in the floor of the American Legion building in Pasadena.

Q. To whom did you sell it?

A. To Mr. Packard of the California Rock Products Company.

Q. Did you sell it to anybody else?

A. To Mr. Mcpherson and Mr. Morris and Captain Tiffany.

Q. Do you remember what compensation you received from them for the Limerock.

A. All the way from twenty five cents to one dollar and one dollar and a quarter per ton, usually fifty cents.

Q. Would it average fifty cents a ton?

A. Yes.

By the Register.

Q. At what point?

A. On the Lapwing.

Q. Fifty cents F.O.B. at the mine.

A. Yes at the mine.

Q. F.O.B. in place or after it was taken out; that was fifty cents F.O.B. in place?

A. Yes.

Q. In other words the purchaser paid for the extracting?

A. Yes.

By Mr. Hintze,

Q. Did you ever go up to the limerock deposit on the Lone Jack?

A. Yes a long time ago.

Q. You know nothing about the conditions there at the present time?

A. Well, you could see the deposit, I have been half way up the hill, four years ago I was all over the property.

CROSS EXAMINATION,

By Mr. Dechant,

Q. You said fifteen tons were taken recently from a cut now open, am I correct in that?

A. Some of that had been mined from this original cut, the storm waters would come down and we had to protect it where they had mined and there was a pile of rock on high ground, I would say about ten tons taken from this cut that is there now.

* * * * *

Q. Now these fifteen tons you say were taken out recently, what was done with them?

A. Sold.

Q. To whom?

A. To Mr. Scheerer, Joseph Scheerer.

Q. Where is he located?

A. He is trying to get my lime deposit started in pretty good shape, he has sold more tonnage than that, there is eighty-five tons gone from the Lady Helen and Lapwing.

Q. From the Lapwing you say there is fifteen tons gone, what are they using that for?

A. Sound proofing in studios, stores.

Q. What other purpose?

A. Stucco.

(1933 Tr. 23-26). 8/

Bartholomew Haskins, son of Richard P. and Tessie Cooke-Haskins, also testified as to the existence of limestone outcrops within the limits of the claims. He noted that "since Mr. Baverstock made his inspection, I have opened it up quite a bit. I have put in several blasts of dynamite; quite a number of tons of rock we have got piled up; I have opened it up considerably since then" (1933 Tr. 32). He testified that the limestone was used for terrazzo, stucco, chicken grit, sound proofing, as flux, in soda plants, the sugar industry, and in the manufacture of paint (1933 Tr. 34, 38).

Richard P. Haskins, Jr., another son of Richard P. and Tessie Cooke-Haskins, also testified.

The following exchange occurred between him and counsel for the Government.

8/ Various questions and answers concerning the exact situs of these cuts have been deleted. They were relevant in that hearing to determine the presence, within each mining claim, of a physical exposure of limestone. Inasmuch as the present claim is an aggregate of all three claims involved therein, the exact situs of each cut is not of particular importance.

Q. What kind of a deposit is this limestone joining the Lady Helen, what kind of a deposit do you call it?

A. What do you mean, by chemical, content.

Q. No. What kind lode or placer?

A. Lode.

Q. Why lode?

A. It is in vein formation.

Q. In what shape does that vein formation occur?

A. What do you mean when you say shape in that way.

Q. What is the characteristic of the vein if there is any characteristic?

A. It runs in a northerly and southerly direction.

Q. Now you look at this lode formation. Is it a solid mass of lime all the way through?

A. Yes.

Q. You don't agree with some of these previous witnesses, it is a lenticular deposit?

A. Not being a technical man --

Q. You don't know what that means?

A. I am just describing what it looks to me.

(1933 Tr. 44-45).

The first witness for the Government was E. C. Galbraith, a mining engineer employed by the Department of the Interior, who had examined the claims. The thrust of his testimony was that while the lime was clearly in a lenticular vein deposition, the vast amounts of the product were more easily quarried from an area on the Lady Helen claim (1933

Tr. 46-51). William H. Friedhoff's testimony was to the same effect at this hearing. See generally 1933 Tr. 56-64.

On January 31, 1934, the Register issued his decision. After reviewing the evidence, the Register concluded:

I am of the opinion that the lands in question are not valuable as a mining proposition, it appearing that the deposit on the Lone Jack is inaccessible and not conducive to practical mining; and that the deposit on the Lap Wing, and the character of the mineral disclosed thereon would not warrant a prudent man in expending his time and money thereupon in the reasonable expectation of success in developing a paying mine.

(Decision at 9-10). Thus, he recommended rejection of the application for patent, but he did not declare the claims null and void.

Tessie Cooke-Haskins duly appealed this decision to the Commissioner of the General Land Office, who by decision dated November 10, 1934, affirmed the Register for the reasons given in his decision. The Commissioner, however, in addition to rejecting the application, declared the claims null and void. This decision was then appealed to the Secretary. In her statement of reasons for appeal, Tessie Cooke-Haskins noted that it was uncontradicted that the deposit on the Lone Jack "exists in vein formation between well defined walls and dips to the east under said Lone Jack claim," and that, the total record showed "that lime rock exists on both claims in vein formation." 9/

9/ Appeal from Commissioner's decision, filed Dec. 19, 1934, at 3, 6.

The Acting Solicitor of the Department of Agriculture, in reply, contended that the most recent testimony showed "the limestone occurs in lenses and not in vein formation," 10/ and criticized the profit estimates of appellant by noting that "counsel has overlooked the large lime deposit on the Lady Helen and other claims to the west as a source of revenue for the claimant at the theoretical profits disclosed on counsel's brief."

In a decision dated April 22, 1935, the First Assistant Secretary generally affirmed the Commissioner. See United States v. Tessie Cooke-Haskins, A-18453. In his review of the evidence, he noted:

It is undisputed that on the [Lady] Helen claim and possibly others held by the claimant and lying adjacent to the lodes in question on the west there are considerable deposits of limestone which have been quarried and marketed; that there are certain lenses of limestone disclosed close to the west side line of the claims, running athwart the general trend of the gneissic formation and within the boundaries of the claims.

The evidence is conflicting, however, as to whether these limestone lenses within the claims are of sufficient extent or are of such quality or are in such a place as to be feasible to work them.

Upon a review of the evidence, the Assistant Secretary concluded that the claimant had not shown that the claims could be successfully

10/ We are unable to explicate the distinction which the Acting Solicitor was apparently trying to draw though he may have been contending that the vein was intermittent, rather than continuous, in addition to being lenticular. Compare with San Francisco Chemical Co. v. Duffield, 201 F. 830 (8th Cir. 1912).

mined and marketed. He also noted "it is not beyond the bounds of possibility that by subsequent exploration and development such demonstration could be made." Accordingly, the Assistant Secretary held that "[u]nder all the circumstances disclosed, the fair and proper action seems to be to merely reject the patent application and leave the mineral claimant free to further pursue exploration under her location." ^{11/}

By letters of June 19, 1935, to President Roosevelt and Secretary Ickes, Tessie Cooke-Haskins objected to the Assistant Secretary's decision. This was treated as a petition for reconsideration.

^{11/} This action by the Assistant Secretary was based on the doctrine demarcated by the Clipper Mining Company cases. Without digressing into the long history of that litigation, which includes a Supreme Court decision styled Clipper Mining Co. v. Eli Mining & Land Co., 194 U.S. 220 (1904), we would note that the rule was eventually enunciated that the Government rejection of a patent application merely determined that a discovery as a then present fact, such as would justify issuance of patent, had not been shown; it did not constitute a "definitive" finding that the land was nonmineral in character or that there was "a total absence" of discovery requisite to location. Thus, rejection of the patent application did not determine the validity or invalidity of the mining location. See generally The Clipper Mining Co. v. The Eli Mining & Land Co., 33 L.D. 660 (1905).

The reason for this approach is more easily appreciated when it is remembered that until the decision in United States v. Strauss, supra, in 1945, the Government was deemed to have the burden of proof that the claim was invalid in mining claim contests. See n.7, supra. When the claimant sought a patent, however, the Department required the claimant to prove entitlement thereto. Thus, the Clipper Mining doctrine was a logical outgrowth of burden of proof analysis. If, in a given case, the evidence was inconclusive, whichever side bore the burden could be deemed to have failed to discharge the same. When a patent application was sought, the claimant would lose, and where a declaration of invalidity was sought, the Government would lose. Once the Department decided in United States v. Strauss, supra, however, that the mining claimant bore the burden of proof, regardless whether or not a patent application was the subject of the contest, the logical support of the Clipper Mining rationale collapsed. It is, therefore, not surprising that this doctrine was eventually expressly overruled in United States v. Carlile, 67 I.D. 417 (1960).

Upon notification of this fact, Haskins wrote to Secretary Ickes and noted that the demand for dolomitic limestone had increased markedly during the Depression. She contended that "the uptrend of the steel industry has made the present demand for dolomite as a fluxing stone increase tremendously. It is also used extensively as a pigment in the manufacture of paint." 12/

By decision of July 23, 1935, the Department granted the claimant a new hearing, conditioned upon the submission of an affidavit corroborated by two disinterested witnesses setting forth in detail the quantity of limestone quarried, shipped, and sold from the claims and all relevant factors surrounding such actions. Claimant subsequently filed a three-page affidavit, witnessed by her two sons. In transmitting the case files to the Register, the Commissioner of the General Land Office stated that while the affidavit submitted did not fully meet the Department's requirements, action on the rehearing would be stayed pending a further examination of the claims by the Forest Service.

The report of this examination, conducted by Friedhoff, was submitted January 22, 1936. In essence, the report indicated that nothing had changed over the past 2 years, and Friedhoff was not swayed from his view that claimant had not shown a discovery. In the course of his report, however, Friedhoff made the following observation:

There are from 5 to 10 acres of flat land on the Lap-Wing lode and Millsite, which being within 3 miles of the City limits of Los Angeles has considerable real estate value

12/ Exh. G-4, letter dated July 18, 1935.

and accounts for the claimant's persistent efforts to patent this land while not being interested in patenting the claims on which the dolomite is located, which latter are unquestionably patentable. [Emphasis supplied.]

The emphasized section of this quotation has been frequently alluded to in the subsequent history of these claims.

Here the matter apparently rested, until June 1, 1962, when Richard P. Haskins, Jr., the present contestee (Tessie Cooke-Haskins having died in 1954 and Bartholomew Haskins in 1962), filed a verified statement pursuant to the provisions of section 5 of the Surface Resources Act, 30 U.S.C. § 613 (1976). This statement covered all four claims and both millsites which occupied the land involved in this appeal.

On July 17, 1964, the Department of the Interior, at the request of the Forest Service, issued a contest complaint alleging that the lands embraced by the mining claims were nonmineral in character and that no discovery existed within the limits of any claim; that a residential building had been constructed upon the Lap Wing mining claim, and that the Lap Wing claim was being utilized for purposes other than mining; and that the two millsites were not being occupied or used for mining or milling purposes. The charges were duly denied and a hearing was held on January 28, 1965, before Hearing Examiner Graydon E. Holt.

The Government's sole witness was Emmett B. Ball, a mining Engineer. Ball testified that the limestone deposits were in pods or

lenses, ranging from a few feet to 60 feet across, the 60-foot measurement being taken from an outcrop just inside the Lone Jack claim (1965 Tr. 32). He described various markets for limestone in the Los Angeles area, such as roofing rock, in foundries and steel mills and as asphalt filler (1965 Tr. 34).

Ball testified as to the assay results of three samples he had taken. The first sample was from the northwest corner of the Lone Jack, just across from the Lady Helen. The sample was assayed as 31.78 percent calcium oxide (CaO), 18.25 percent magnesium oxide (MgO), and 3.56 percent silica (SiO₂). Ball stated that while some foundries could utilize limestone with the high percentage of magnesium shown, the silica content was too high (1965 Tr. 42). The same would hold true for use in tile, though Ball thought the dust could be used for filler in asphalt. Ball stated that, in view of the difficulty in obtaining access to the deposit, it could not be economically mined.

Ball also stated that he took two other samples, both from the Lady Helen claim. These two samples assayed at 34.56 percent CaO, 14.77 percent MgO, 5.51 percent SiO₂, and 31.04 percent CaO, 19.78 percent MgO, 1.53 percent SiO₂, respectively. With regard to the first sample, Ball contended that, with the high silica content, the only use would be roof granules, but since white rock was adjacent to black this would not be feasible. ^{13/} While Ball noted that the second

^{13/} Ball subsequently testified on cross-examination that limestone for roofing granules had to be white, not gray, because that is what customers wanted (1965 Tr. 83-85).

sample showed a significantly lower percentage of silica, he stated that the main market would still be for use in roofing granules and that this deposit suffered the same infirmities as far as color consistency, as did the other ore on the Lady Helen. See generally 1965 Tr. 45-50; Exhs. 10, 11.

At the conclusion of Ball's testimony the Government withdrew its charge relating to the utilization of the Lap Wing claim for purposes other than mining. Richard P. Haskins, Jr., then took the stand. Haskins described the strikes of the various deposits noting that they tended in a northwesterly direction (1965 Tr. 114-16). He estimated total tonnage on all four claims of 500,000 tons (1965 Tr. 118). With respect to the two millsites, Haskins noted that the Lap Wing had, in the past, been used for storage, though he intended at some future time to use it for crushing purposes. ^{14/} With respect to the Lady Helen millsite he stated that years ago it had a miner's cabin on it, and was used for living purposes.

Haskins testified as to certain past sales of dolomite from the claims. These were various sales to Hill Brothers between 1934 through 1936, which Haskins estimated ran 80 to 90 tons per month and which was crushed and used for additives and filter materials (1965 Tr. 126). Haskins also referred to sales to Kinney Iron Works, Washington Elger, which made bathroom fixtures, and Kennedy Minerals, all from 1934 to

^{14/} Haskins subsequently stated that he did have portable mining equipment presently on the lower portion of the Lap Wing (1965 Tr. 142-44).

1940 (1965 Tr. 125-28). He noted that the foundry specifications required that the product be uniform in size, and that most of the product shipped from the claims varied from 3 inches down to 3/4 of an inch (1965 Tr. 130-31). He estimated a total of 18,000 tons had been removed during the period from 1934 to 1940 (1965 Tr. 145).

Norman Whitmore, a mining engineer with more than 40 years experience, also testified on behalf of the claimant. He estimated that, from the largest deposit located in the Lone Jack and Lady Helen claims, there existed in excess of 200,000 tons of dolomite and the probability of twice that (1965 Tr. 155-57). He noted that the "strike in this vein" was northwesterly with a dip of 70 degrees (1965 Tr. 178-79). Throughout his testimony he was quite insistent upon the difference between dolomite and limestone. He stated that "real true dolomite is approximately half calcium and half magnesium" but noted that this theoretical dolomite was a very rare thing. A sample which showed 58 percent CaCO_3 and 41 percent MgCO_3 he considered to be a good grade of dolomite (1965 Tr. 187). With respect to his assays of various pieces of rock taken from the claims he stated:

A. They will run all the way from almost pure dolomite down to what we would call low dolomite, low magnesium content. We didn't get any of them below around about 10 per cent.

Q. Ten per cent of what?

A. Magnesium.

Q. Below 10 per cent of magnesium?

A. Yes. That's why we consider this a dolomite deposit, not a limestone deposit.

(1965 Tr. 189-90). 15/

Whitmore testified to chemical uses of dolomite:

They put it in the bottom of a furnace so it won't heat out. Then in refractory brick to line furnaces. In cements, like they build steps out of. Then, the sugar industry. Glass, plastics, like in manufacturing of rayon. Also for fertilizers, plant use and insecticides. They even put it in cow feed. Also in the rubber industry, fluxes. In the chemical industry, calcium carbide. Oil industry, tanning. It can be used in the white of the paper.

(1965 Tr. 161). He stated that he thought the property was worth exploiting in its present condition

(1965 Tr. 166).

By decision of June 18, 1965, Hearing Examiner Holt declared the claims null and void. After recounting the history of the claims and the evidence adduced at the hearing, he concluded that the main deposit on the Lady Helen, from which "wages" might have been obtained in the 1930's, was now substantially depleted. The hearing examiner noted:

15/ Whitmore's insistence on the term "dolomite" is clearly shown in an exchange he had with Government's counsel:

"Q. Did you examine the point where quantities of limestone had been removed back in the 40's?

"A. Well, I thought this was a dolomitic property instead of limestone property.

"Q. Well, I don't mean to play on words. Whatever material was removed back in the '30's, '40's."

(1965 Tr. 180).

Dolomitic limestone is widespread throughout Southern California and the market is being supplied by presently operating companies. A new small scale dolomite operation in competition with the present quarries is likely to be successful only where it has distinct advantages such as accessibility, high quality material, nearness to a market, and conditions which permit very cheap quarrying. The contestee did not establish that his quarry had any of these advantages. Until he does there is no basis for believing that the further expenditure of labor and means on the claims would have a reasonable prospect of success or that there is a present market for the material.

(1965 Decision at 7). The decision of the hearing examiner was received by Haskins' counsel on June 24, 1965.

On July 9, 1965, counsel for Haskins filed a notice of appeal to the Office of Appeals and Hearings, Bureau of Land Management (BLM). Thus commenced a procedural wrangle that took the better part of a decade to resolve. The hearing examiner acknowledged receipt of the notice of appeal, but noted that the Departmental appellate regulations required the submission of \$5 for each mining claim involved in an appeal. See 43 CFR 1842.4(b) (1965). 16/ Appellant's check for \$30 was received July 21, 1965. Appellant's statement of reasons was filed with the Office of Appeals and Hearings on August 16, 1965.

By decision of September 28, 1966, the appeal was dismissed by the Chief, Branch of Mineral Appeals, on the ground that the statement of reasons had not been filed within 30 days of the filing of the notice

16/ This filing fee requirement was abolished upon the establishment of the Office of Hearings and Appeals in 1970, at which time the Office of Appeals and Hearings, BLM, was merged with the appellate adjudicatory function of the Assistant Solicitor -- Public Lands, in creating the Board of Land Appeals.

of appeal as required by the applicable regulation, 43 CFR 1842.5-1 (1965) (now 43 CFR 4.412). On October 17, 1966, the claimant sought reconsideration of this decision. First, he pointed out that he had filed his statement of reasons within 30 days of perfecting his appeal, *i.e.*, the tendering of the \$30 filing fee on July 21, 1965. Second, he adverted to the 10-day grace period provided by 43 CFR 1840.0-8(b) (1965) (now 43 CFR 4.401(a)), and argued that his statement had been received within the grace period. Third, he argued that the regulations provided a total of 60 days in which one could file a statement of reasons from the date of receipt of an adverse decision, and that this he had done.

These arguments were unavailing. By letter of October 21, 1966, the request for reconsideration was denied. His appeal to the Secretary was denied by decision styled United States v. Haskins, A-30737 (Dec. 19, 1966). Haskins then sought judicial review of this ruling.

By decision of April 15, 1968, styled Haskins v. Udall, No. 67-1815-CC, the District Court for the Central District of California dismissed the appeal and affirmed the action of the Department. An appeal was taken from this decision to the Ninth Circuit Court of Appeals. During the pendency of this appeal, the Ninth Circuit issued a decision in Tagala v. Gorsuch, 411 F.2d 589 (1969), holding that dismissal for failure to file timely a statement of reasons was not mandatory under the Department's regulations, but rather

required the exercise of discretion. 17/ Accordingly, the parties stipulated that the Haskins appeal be remanded to the Director, BLM, for the exercise of discretion, and this order was approved by the Court on October 3, 1969. 18/

While the above matter was proceeding through the Federal Courts, however, Haskins filed an application for patent for a placer claim denominated as the Haskins Quarries placer mining claim. This application was filed on May 27, 1968, and was based on the provisions of 30 U.S.C. § 38 (1976) and 30 U.S.C. § 161 (1976). While a mineral surveyor was subsequently selected, the State Director of the California State Office, by decision of May 29, 1969, suspended the survey until further notice.

Counsel for Haskins then moved the Department to stay action on the remand from the Ninth Circuit until a determination had been made as to the validity of the asserted placer claim. This request was denied in the decision of this Board, dated July 30, 1971, and styled United States v. Haskins, 3 IBLA 77 (1971). This decision also examined the circumstances behind the original late filing of the statement of reasons, but held that the record did not show a sufficient basis upon

17/ Prior to Tagala v. Gorsuch, supra, the Department had consistently interpreted the 30-day filing requirement for the statement of reasons as mandating the dismissal of all late filings, absent a showing that the 10-day grace period was applicable. Thus, though the two decisions issued by BLM and the Assistant Solicitor, respectively, did not indicate that dismissal was mandatory, there is no question that it was so perceived at that time.

18/ Copies of the documents involved in the Court proceedings are found in Exhibit G-2.

which to grant relief, and refused to waive the late filing. Id. at 83. With respect to the placer claim, the opinion noted "the propriety and validity of the asserted placer claim are not before this office for decision." Id. at 84 n.9. While Haskins subsequently argued that this statement meant that the placer claim should be surveyed, the California State Director, by letter of September 3, 1971, canceled the mineral survey.

On February 3, 1972, the United States filed in the U.S. District Court for the Central District of California, a complaint in ejectment against Haskins, premised on the Department's 1971 decision, which in effect, had held the four lode claims and two millsites invalid. In addition, the suit sought rental for past use. On March 2, Haskins filed an answer and a counterclaim. Haskins' answer denied that the decision of the Secretary declaring the claims invalid was final, binding, and conclusive since a reasonable time had not expired from the date of that decision, and also adverted to the existence of the Haskins Quarries placer mining claim. In his counterclaim, Haskins alleged that he possessed a possessory right to the land based on an asserted placer location made under the provisions of 30 U.S.C. § 38 (1976), and prayed for a declaration that the Haskins Quarries placer claim was a valid existing claim. The United States subsequently filed a motion to dismiss the counterclaim.

On May 18, 1972, the District Court issued a memorandum opinion. See United States v. Haskins, No. 72-246-JWC (C.D. Cal. 1972). The Court noted:

In moving for a summary judgment of dismissal of defendant's counterclaim, the Government urges that since the land embraced within the lode claims was held to be without commercial value in the contest proceedings, the issue is res adjudicata in the patent application proceedings relating to the placer claim. But this is not necessarily so. There is after all a difference between a lode claim and a placer claim. The former relates to a vein of quartz or other rock in place, whereas a placer claim covers all forms of deposit excepting a vein of quartz or other rock in place, and what might be an insufficient showing of commercial value in support of a lode claim, might well be sufficient to establish a valid placer mining claim. Both types of claims can, of course, be made upon the same property and can co-exist, even though in different ownership.

Although the Director might well believe, with the knowledge obtained from the contest proceedings, that defendant could not possibly make a showing of value sufficient to support a placer claim, the claimant is, nevertheless, entitled to try, and is further entitled to have any adverse ruling reviewed by this court.

(Memorandum Opinion at 3-4). The Court, however, declined to rule on the existence of a discovery within the limits of the claim, contenting that this was properly subject to the initial jurisdiction of the Department of the Interior.

A motion for rehearing was filed by the Government and opposed by the claimant. On June 28, 1972, the District Court denied the motion, but, noting that there were controlling questions of law for which there were substantial ground for differences of opinion, authorized an immediate appeal as provided by 28 U.S.C. § 1292(b) (1976), with respect to three questions of law:

1. Can the defendant pursue his application for patent of the Haskin's Placer Mining Claim pursuant to Title 30 U.S.C. § 38 where his lode claims under which he had previously worked the property have been declared invalid for lack of discovery?

2. Does defendant's possession of the property which antedates the effective date of the Watershed Withdrawal Act of 1928 by more than five years, entitle him to proceed with his patent application notwithstanding the fact that his notice of intention to hold as a placer mining claim was not filed until subsequent to the effective date of the Watershed Withdrawal Act?

3. If the defendant is entitled to proceed with his patent application and since the Government has chosen this Court as a forum, does this Court have jurisdiction over the patent application proceeding to the extent that it may make an order declaring the defendant entitled to a patent, or should these proceedings be remanded to the Department of the Interior to process defendant's application administratively?

The Department did pursue such an appeal. By decision of October 25, 1974, reported as United States v. Haskins, 505 F.2d 246, the Ninth Circuit affirmed the District Court in all respects. In its decision, the Court adverted to an affidavit of E. Rowland Tragitt, a mineral engineer with nearly 30 years of experience in the Government, which had been filed in the District Court to support the claimant's motion for summary judgment. Thus, the Ninth Circuit noted that Tragitt had stated that:

[T]here is a minimum of 900,000 tons of dolomite on the claims and that the use of dolomite in the Los Angeles area included the following: Flux in iron and steel foundries, filler in paints, asphalt and rubber, the manufacture of glass, paper, refractories, insulation and fertilizer, and as a supplement in animal feed. Mr. Tragitt also stated: "That in addition to the dolomite, there are

a minimum of 100,000 tons of decorative stone marketable for use as roofing granules, terrazzo chips, and decorative stone in walls, rock gardens, fire places, and patios."

505 F.2d at 248.

After briefly reviewing the history of the litigation surrounding the claim, the Ninth Circuit turned to the issues posed by the District court. Concerning the applicability of 30 U.S.C. § 38 (1976), the Court noted that "[t]he evidence unequivocally shows that Haskins and predecessors have been in possession of the ground and have worked the claims for over half a century," and that section 38 permitted them to assert valid placer locations for the ground in question without proof of posting, recording notices of location, and the like. Id. at 250. The Court noted, however, that a discovery was necessary to acquire any rights under 30 U.S.C. § 38 (1976).

The Court then examined the question of the status of dolomite in lode form on the claims. The Court noted that "[t]he Interior Department has held that limestone deposited in lode formation is properly claimable as a lode claim and not as a placer claim. * * * That seems to be true of the dolomite and dolomite limestone deposits in the present case." Id. at 251. Referring to the prior adjudications of the lode claims the Court stated:

It may be that some of the dolomite is not in lode formation. To the extent that it is deposited as a zone or belt of mineralized rock lying within boundaries separating it from neighboring rock, Haskins cannot twice litigate the issue of the existence of this valuable mineral in the

ground. He is precluded by the doctrine of res judicata. Consequently, whatever the merits of Haskins' claimed placer locations, their validity cannot be supported by proof of the presence of dolomite or dolomite limestone in lode formation. Haskins cannot use the same material that he relied on as discovery of valuable mineral under his lode locations to support his present placer applications. [Emphasis supplied.]

Id.

With respect to the validity of Haskin's "placer claims as building stone locations" 19/ under 30 U.S.C. § 161 (1976) the Court referred to Tragitt's affidavit as to the 100,000 tons of decorative stone for use as roofing granules, etc., and stated:

Our search of the record has disclosed no instance in which the validity of mining locations for this mineral on the ground in question has been decided, or even placed in issue. Further, it cannot be determined from the present record whether the placer location for building stone was thrown in as an afterthought and not in good faith. The difficulties inherent in proving up on a placer location for building stone are apparent to anyone familiar with the mining laws. * * * Nevertheless, in the language of the District Court, the "claimant is entitled to try." [Citations omitted.]

Id. at 252.

The Court also held that it was too late for Haskins to seek review of the Board's 1971 decisions. Rather, upon the filing by the

19/ The Court's use of the plural in this sentence is somewhat confusing. In contradistinction to the separate lode claims which appellant asserted in the three previous contests, there is, in actuality, only one placer claim asserted, which embraces all of the land sought under the four lode and two millsite claims. This is a matter of some importance to which we will return, infra.

Government of the complaint in ejectment it became Haskins' obligation to directly attack the Board's decision in a compulsory counterclaim. Having failed to so proceed, the Board's decision was no longer open to assault. The Court also noted that, while there was some question as to the claimant's good faith in this placer claim assertion, in view of the record "the least that can be said is that there is a disputed issue of material fact which precludes summary judgment." *Id.* at 253. Finally, the Circuit Court agreed with the District Court that insofar as the question of discovery is concerned, "the expertise of the Department in the premises is appropriately invoked."

The case was remanded for further action consistent with the opinion. Accordingly, on March 7, 1975, a complaint was issued, seeking to have the mineral entry canceled and the Haskins Quarries placer mining claim declared void. ^{20/} An answer was timely filed, and the case came on for a hearing in 1977.

Before discussing the evidence adduced at this most recent hearing, it is helpful to examine the various legal principles involved in this controversy. All claims, be they in lode or placer form, and regardless of how they are initiated, are valid only if they are supported by a discovery of a valuable mineral deposit. In *Castle v. Womble*, 19 L.D. 455, 457 (1894), the Department laid down a test which has remained at the bedrock of mining claim adjudication to this day. A discovery exists, Secretary Smith stated, "where minerals have been

^{20/} The exact grounds for this action are set forth in detail, *infra*.

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 test soon won the approbation of the United States Supreme Court in Chrisman v. Miller, 197 U.S. 313 (1905). Over a considerable period of time, this test was refined to require a showing of present marketability, that is, that the claimant has a reasonable expectation that the mineral can be extracted, removed, and marketed at a profit. See United States v. Coleman, 390 U.S. 599 (1968).

[1, 2] There are two basic methods of locating a mining claim, dependent upon the nature of the mineral deposition, i.e., lode and placer. 21/ Inasmuch as the difference between these two modes of location lies at the center of this case, we will examine both the historical genesis of these two types of claims and the subsequent application of the theoretical bases upon which these different types of location are premised.

The first congressional enactment relating to the general disposition of mineral lands was the Act of July 26, 1866, 14 Stat.

21/ In this regard, we would note that a tunnel site located under the Tunnel Site Act, § 4 of the Act of May 10, 1872, 17 Stat. 92, 30 U.S.C. § 27 (1976), is not properly deemed a mining claim. Creede & Cripple Creek Mining & Milling Co. v. Uinta Tunnel Mining & Transportation Co., 196 U.S. 337, 359 (1905). It is, indeed, only a means of exploration and discovery, in the nature of a right-of-way. Id. at 357-59; see also Calhoun Gold Mining Co. v. Ajax Gold Mining Co., 182 U.S. 499 (1901); United States v. Livingston Silver, Inc., 43 IBLA 84 (1979). The status of a millsite as a mining claim was recently discussed in Feldslite Corp. of America, 56 IBLA 78, 88 I.D. 643 (1981).

251. 22/ Section 1 of the Act declared that

the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation * * * subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States. [23/]

But, while mineral deposits, however found, were declared open to exploration and occupation, subsequent sections provided only for the acquisition of title to certain lode claims. Thus, sections 2 and 3, which enacted various procedures for obtaining patent, applied only to a claim of "a vein or lode of quartz, or other rock in a place, bearing gold, silver, cinnabar, or copper." 24/

22/ While, prior to this enactment, there had been a number of specific pieces of legislation relating to the sale of lands valuable for lead, copper, and coal, the Act of July 26, 1866, supra, was the first Federal legislation to deal with mining as a general proposition. See Act of Mar. 3, 1829, 4 Stat. 364; Act of July 11, 1846, 9 Stat. 37; Act of Mar. 1, 1847, 9 Stat. 146; Act of July 1, 1864, 13 Stat. 343; Act of Mar. 3, 1865, 13 Stat. 529.

23/ Even prior to this enactment, Courts had recognized the validity of rules, regulations, and customs established by mining districts as they related to a possessory right to a mining claim. Thus, in Sparrow v. Strong, 70 U.S. (3 Wall.) 97 (1865), Chief Justice Taney noted:

"We know, also, that the Territorial legislature has recognized by statute the validity and binding force of the rules, regulations, and customs of the mining districts. And we cannot shut our eyes to the public history, which informs us that under this legislation, and not only without interference by the national government, but under its implied sanction, vast mining interests have grown up, employing many millions of capital, and contributing largely to the prosperity and improvement of the whole country." (Footnote omitted.) *Id.* at 104.

24/ Lindley suggests that the failure of Congress to provide for a means of patenting placer claims was occasioned by a decline in the once predominant placer mining activity in California, whereas lode mining was increasing. See Lindley on Mines, § 57 (1897).

Four years later, Congress remedied its previous omission by adopting the Act of July 9, 1870, 16 Stat. 217, generally referred to as the Placer Act. That Act provided, in relevant part, "[t]hat claims, usually called 'placers,' including all forms of deposit excepting veins of quartz, or other rock in place, shall be subject to entry and patent under this act, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims."

Two years subsequent, Congress adopted the Act of May 10, 1872, 17 Stat. 91. Together with various provisions of the 1866 and 1870 Acts, the general mining law of the United States was thereby established. See generally 30 U.S.C. §§ 21-47 (1976). For our purposes, it is important, at this point, to focus on two specific aspects. First, section 2 of the 1872 Act established new limitations on the length and width of lode deposits. In so doing, however, Congress also enlarged the ambit of the 1866 Act in relation to the nature of the lode claims that might go to patent. Section 2 referred to "mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits" in promulgating the new limitations. (Emphasis supplied.) Second, section 10 of the 1872 Act provided that the various provisions of the Placer Act of 1870 "shall be and remain in full force" subject to certain specified changes. 25/

25/ Among these changes was a requirement that no location "shall include more that twenty acres for each individual claimant." Section 10 of the Act of May 10, 1872, 17 Stat. 94. This is a point which will be examined, infra.

Thus developed the essential statutory dichotomy which exists to this day. A lode claim is one located "upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits." 30 U.S.C. § 23 (1976). A placer claim is essentially everything else. 30 U.S.C. § 35 (1976). Thus, in United States v. Iron Silver Mining Co., 128 U.S. 673, 679 (1888), a placer claim was defined as "ground that includes valuable deposits not in place, that is, not fixed in rock, but which are in a loose state." (Emphasis added.)

While such a bifurcated approach would seem to minimize uncertainties as to the proper mode of location, in reality, such has not been the experience of mining claimants. However, before exploring the various judicial and Departmental interpretations relating to this question, we should note one other statute which is involved in this appeal, namely the Act of August 4, 1892, 27 Stat. 348, 30 U.S.C. § 161 (1976).

[3] This Act, occasionally referred to as the Building Stone Act, was adopted by Congress in order to clear up confusion which had been generated by various decisions of the Interior Department.

26/ The

26/ Commissioner McFarland of the General Land Office had originally ruled that lands chiefly valuable for building stone might be entered as placer claims. H. P. Bennet, Jr., 3 L.D. 116 (1884). This ruling, however, was brought into question by Assistant Secretary Chandler's decision in Conlin v. Kelly, 12 L.D. 1 (1891), wherein the Department held that a quarry of stone useful for general purposes was not subject to entry as a placer mining claim. The following year, Congress adopted the Act of August 4, 1892, supra. Subsequently, Assistant Secretary Chandler, in a decision which involved a claim located prior to the 1892 Act, distinguished Conlin v. Kelly, supra: "In that case

Act provided, in relevant part, that:

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

30 U.S.C. § 161 (1976). Thus, by statute, lands chiefly valuable for building stone must be entered as placer claims. ^{27/}

fn. 26 (continued)

the stone was useful only for general building purposes, while in this case the stone is not only useful for those purposes, but also very valuable for the ornamentation of buildings, and for monuments and other commercial purposes." (Emphasis in original.) McGlenn v. Wienbroer, 15 L.D. 370, 374 (1892). In this case, the Department held that the land was properly located as a placer claim under the 1872 Mining Act.

This sequence of events had generally been interpreted as meaning that the Building Stone Act applied only to common varieties of building stone, with uncommon varieties (whatever they might be) subject to the location provisions of the general mining laws. Under this interpretation, the passage of section 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1976), known as the Common Varieties Act, which removed common varieties of building stone from location under the mining laws, including the Building Stone Act, would have effectively repealed the Building Stone Act since it only applied to such types of building stone. See generally 1 American Law of Mining § 5.20 (1980). The Supreme Court decision in United States v. Coleman, *supra*, however, which expressly held that the Common Varieties Act left "30 U.S.C. § 161, the 1892 Act, entirely effective as to building stone that has 'some property giving it distinct and special value' (expressly excluded under § 611)," 390 U.S. at 605, must be seen as substantially undermining this analysis.

^{27/} We note that in Bowen v. Sil-Flo Corp., 451 P.2d 626, 632-33 (Ariz. App. 1969), the Arizona Court of Appeals, in examining an argument that perlite was a building stone, and as such must be located as a placer, cited the statutory language of 30 U.S.C. § 161 (1976) and then stated: "By its very terms, this statute is permissive ('may'), and the appellant has cited no authority holding that, because a mineral deposit might be locatable under this section of the code, it necessarily could not be located as a lode." 451 P.2d at 634. With due deference to the Court, however, we must point out that it has misinterpreted the statutory usage of the word "may" in the context of the Building Stone Act.

Of crucial import in the distinction between lode and placer claims was the fact that "[a] placer discovery will not sustain a lode location nor a lode discovery a placer location." Cole v. Ralph, 252 U.S. 286, 295 (1920). ^{28/} Thus, error in the mode of location could result in the invalidation of a claim.

Among the early definitions relating to lode deposits were those of Justice Field, sitting at circuit, in Eureka Consolidated Mining Co. v. Richmond Mining Co., 8 F. Cas. 819 (C.C.D. Nev. 1881), aff'd, 103 U.S. 839, and Judge Hallett of the Colorado Circuit Court in Stevens v. Williams, 23 F. Cas. 44 (C.C.D. Colo 1879), both of which achieved immediate currency. In Eureka, Justice Field wrote:

It is difficult to give any definition of the term as understood and used in the Acts of Congress, which will not be

fn. 27 (continued)

As noted in our discussion in n.26, supra, the Building Stone Act was adopted to effectively overrule the Department's decision in Conlin v. Kelly, supra, which held that a stone quarry was not subject to entry under the mining laws. That decision had noted, however, that the land was available for entry under the Timber and Stone Act, Act of June 3, 1878, 20 Stat. 89. The use of the word "may" in the Building Stone Act referred not to the possibility that lands chiefly valuable for building stone might be entered as a lode as well as a placer, but rather to the fact that lands chiefly valuable for building stone were subject to location under the mining laws as a placer or subject to entry under the Timber and Stone Act. While there may be few cases on this point, the reason for this is that it has been universally assumed that lands chiefly valuable for building stone could be taken up only as placer claims. See, e.g., PLLRC Report entitled Legal Study of the Nonfuel Mineral Resources, at 317; Meiklejohn v. F. A. Hyde & Co., 42 L.D. 144 (1913); Henderson v. Fulton, 35 L.D. 652 (1907).

^{28/} Among other important distinctions are the price paid per acre (\$5 for lode, but \$2.50 for placer, see 30 U.S.C. §§ 29 and 37 (1976)), and the fact that extralateral rights may appertain to lode locations, but do not apply to placer locations. 30 U.S.C. § 26 (1976).

subject to criticism. A fissure in the earth's crust, an opening in its rocks and strata made by some force of nature, in which the mineral is deposited, would seem to be essential to the definition of a lode, in the judgment of geologists. But to the practical miner, the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock lying within any other well-defined boundaries on the earth's surface and under it, would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term as used in the Acts of Congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rocks. It includes, to use the language cited by counsel, all deposits of mineral matter found through a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same processes.

8 F. Cas. at 823.

In Stevens, supra, Judge Hallett charged the jury:

[A]s to the word "vein" or "lode," it seems to me that these words may embrace any description of deposit which is so situated in the general mass of the country, whether it is described in any one way or another; that is to say, whether, in the language of the geologist, we say that it is a bed, or a segregated vein, or gash vein, or true fissure vein, or merely a deposit * * *. [W]henever a miner finds a valuable mineral deposit in the body of the earth * * * he calls that a lode, whatever its form may be, and however it may be situated, and whatever its extent in the body of the earth.

23 F. Cas. at 45.

Both of these definitions were subsequently cited, with approval, by the United States Supreme Court in Iron Silver Mining Co. v.

Cheesman, 116 U.S. 529, 533-34 (1886). See also United States v. Iron Silver Mining Co., *supra* at 680; Reynolds v. Iron Silver Mining Co., 116 U.S. 687, 695 (1886).

While these definitions sufficed to cover many types of mineral deposition, there were mineral deposits which were not easily classified as either lode or placer. ^{29/} Because the instant appeal implicitly raises the question of the proper mode of location for limestone deposits, the subsequent analysis will relate only to such claims.

[4] Early cases involving limestone deposits, such as Eureka Consolidated Mining Co. v. Richmond Mining Co., *supra*, actually concerned limestone deposits which themselves were mineral bearing, *i.e.*, the claims were not located for the limestone, but rather were located for precious metals which were carried within the limestone structure. See also Jupiter Mining Co. v. Bodie Consolidated Mining Co., 11 F. 666, 675 (C.C.D. Cal. 1881). Thus, while these claims were lode locations, this fact was not dispositive of the question of the proper form of location for limestone claims.

Limestone, itself, was held to be a mineral within the meaning of the mining laws as early as Secretary Teller's decision in Maxwell v.

^{29/} The questions have continued through the years, particularly as the types of minerals being located have changed. For a discussion on problems associated with uranium locations, see D. Sherwood and G. Greer, Mining Law in a Nuclear Age: The Wyoming Example, 3 Land and Water Law Review 1 (1968). See also Geomet Exploration, Ltd. v. Lucky Mc Uranium Corp., 601 P.2d 1344, 1345 (Ariz. App.), *rev'd*, 601 P.2d 1339 (Ariz. 1979).

Brierly, 10 C.L.O. 50 (1883). Ten years later, in Shepherd v. Bird, 17 L.D. 82, 84-85 (1893), the Department expressly held that limestone suitable for making lime was subject to mineral entry under the placer form and not as a lode location. ^{30/} See also Long v. Isaksen, 23 L.D. 353 (1896). Later, in Henderson v. Fulton, 35 L.D. 652 (1907), the Acting Secretary held that marble could not be located as a lode claim because it did not "possess the elements of rock in place bearing one or more of the minerals specified in the statute, or some other mineral that would be embraced within the added words 'other valuable deposits.'" Id. at 663 (emphasis supplied). While this case expressly applied only to deposits of marble, its logic, of course, would apply to limestone. Under such analysis, no deposit of limestone, regardless of the nature of its deposition, which was valuable for the limestone, could be located as a lode.

Approximately 5 months after the Department's decision in Henderson v. Fulton, *supra*, however, the Eighth Circuit Court of Appeals held that asphaltum was locatable as a lode claim in Webb v. American Asphaltum Mining Co., 157 F. 203 (1907). The Court noted that:

The test which Congress provided by this legislation to be applied to determine how these deposits should be secured was the form and character of the deposits. If they are in veins or lodes in rock in place, they may be located and purchased under this legislation by means of lode mining claims; if they are not in fissures in rock in place but are loose or scattered on or through the land they may be located and bought by the use of placer mining claims.

^{30/} The decision held that such a limestone deposit was also subject to purchase under the Timber and Stone Act, *supra*.

Id. at 206. Inasmuch as asphaltum (also known as gilsonite) is the vein itself, this decision cast serious doubt on the correctness of the Henderson analysis. See also San Francisco Chemical Co. v. Duffield, supra.

Eventually in Dunbar Lime Co. v. Utah-Idaho Sugar Co., 17 F.2d 351 (8th Cir. 1926), it was held that a limestone deposit which was useful in flux and in the making of cement was locatable as a lode. This decision rejected an argument that the deposit should have been located as a placer in conformity with the Building Stone Act, inferentially holding that such qualities as the deposit possessed did not make the land chiefly valuable for building stone. 31/

The import of such judicial pronouncements was not lost upon the Department. In Big Pine Mining Corp., 53 I.D. 410, 412 (1931), the Department invalidated various placer locations of limestone on the grounds that there was no showing of marketability. The decision further noted that "it is undisputed that the deposit is in lode formation" and cited Cole v. Ralph, supra, for the proposition that a lode

31/ Dunbar Lime Co. v. Utah-Idaho Sugar Co., supra, involved the specific question whether lands within numbered school sections which were embraced by certain limestone lode claims were chiefly valuable for building stone. At the time of the Utah Enabling Act, known mineral lands were excluded from the grants to the State. See United States v. Sweet, 245 U.S. 563 (1918). This limitation was subsequently removed by the Act of January 25, 1927, 44 Stat. 1026. Lands chiefly valuable for building stone, however, were, by the express terms of the Building Stone Act, subject to the grant to the State. Thus, had the land been chiefly valuable for building stone, the State's title would have attached in 1894 despite the prior appropriation of a mineral claimant. Because the Court held that the limestone was not chiefly valuable for building stone, the mineral claimant prevailed over the State's subsequent lessee.

discovery would not sustain a placer location. A year later, in Vivia Hemphill, 54 I.D. 80 (1932), the Department expressly abandoned the rule enunciated in Shepherd v. Bird, *supra*, and Henderson v. Fulton, *supra*, and held that a deposit of limestone which existed in lode form with well defined walls and which was valuable for the burning of lime and the manufacture of portland cement was subject to location as a lode or vein.

While the Department has followed the ruling of Vivia Hemphill ever since its rendition, ^{32/} we must recognize that a certain anomaly exists with respect to the proper mode of location for limestone. If the lands embraced by a claim for limestone are chiefly valuable for building stone purposes that claim must, under the Building Stone Act, be located as a placer claim, regardless of the actual form of deposition. United States v. Gardner, 14 IBLA 276, 280, 81 I.D. 58, 60 (1974). On the other hand, if the limestone is chiefly valuable because of chemical or metallurgical properties, the proper mode of location is dependent upon the nature of the deposition. The relevancy of this distinction will be discussed, *infra*.

[5] Turning to the acts necessary for location, the only express Federal requirements for location relate to the necessity of making a

^{32/} While the argument is still occasionally made that the rock in place must be mineral-bearing rather than valuable in itself (*see* discussion, *infra*), in order for it to be locatable as a lode, this argument has been consistently rejected. *See Bowen v. Sil-Flo Corp.*, *supra*; United States v. Bowen, 38 IBLA 390, 399-400 (1979).

discovery of a vein or lode within the limits of a lode claim (30 U.S.C. § 23 (1976)), and the marking of the boundaries of a lode claim on the ground (30 U.S.C. § 28 (1976)). See Vevelstad v. Flynn, 230 F.2d 695 (9th cir. 1956). The contents of the actual notices of location and the manner of recordation were left to the local mining districts and the various states. ^{33/} Nevertheless, failure to follow state requirements may result in the invalidation of a claim under the Federal laws. See Roberts v. Morton, 549 F.2d 158, 161-62 (10th Cir. 1977), aff'g United States v. Zweifel, 11 IBLA 53, 80 I.D. 323 (1973).
^{34/}

The patent provisions for both lode and placer claims, however, direct the claimant to show compliance with the various requirements of the General Mining Laws. See 30 U.S.C. §§ 29, 35 (1976). Thus, in the course of a patent application, the Department has consistently required a claimant to show a possessory right to the claim supported

^{33/} It should be noted, however, that certain posting requirements were established by section 1(a) of the Act of Aug. 12, 1953, 67 Stat. 539, 30 U.S.C. § 501(a) (1976); section 1(a) of the Multiple Mineral Development Act, Act of Aug. 13, 1954, 68 Stat. 708, 30 U.S.C. § 521(a)(1976); and section 2 of the Act of Aug. 11, 1955, 69 Stat. 679, 30 U.S.C. § 541(a) (1976). See also 43 CFR 3831.1. In addition to the above laws, various recording requirements also existed in section 2(b) of the Mining Claims Rights Restoration Act, Act of Aug. 11, 1955, 69 Stat. 682, 30 U.S.C. § 621(b) (1976). No general Federal recordation requirements existed until 1976, when Congress adopted section 8 of the Mining in the Parks Act, Act of Sept. 28, 1976, 90 Stat. 1342, 1343, 16 U.S.C. § 1907 (1976), and section 314 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2743, 2769, 43 U.S.C. § 1744 (1976).

^{34/} While the Department had originally taken the position that compliance with state law requirements was not a matter of concern in mining claim contests within the Department (see Reins v. Murray, 22 L.D. 409 (1896)), the adoption of a regulation specifically requiring compliance with state laws, see 43 CFR 3831.1, was held by the Court in Roberts v. Morton, supra, to result in a Federal requirement that such laws be complied with.

by a certificate or abstract of title. 43 CFR 3862.1-3(a), 3863.1-3(a). See Kerr-McGee Nuclear Corp. (On Reconsideration), 43 IBLA 348 (1979); Daniel Cameron, 4 L.D. 515 (1886). Situations, however, could arise in which such proofs were difficult, if not impossible, to obtain. Congress in the 1870 Placer Act had made provision for situations in which, due to this passage of time, it would become difficult to prove that the initial acts of location and recordation, as well as subsequent transfers, had occurred in compliance with the law. Section 38 of Title 30 provides:

Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter and sections 71 to 76 of this title, in the absence of any adverse claim.

30 U.S.C.A. § 38 (West 1971).

The Supreme Court discussed this provision in Cole v. Ralph, *supra*. Therein, the Court noted that section 38 is a remedial provision and was designed "to make proof of holding and working for the prescribed period the legal equivalent of proofs of acts of location, recording and transfer." 286 U.S. at 305. ^{35/} The Court, noting that

^{35/} In Humphreys v. Idaho Gold Mines Development Co., 120 P. 823, 827 (Idaho 1912), the Supreme Court of Idaho noted that "[t]he adverse possession referred to in the statute is intended to supply the place of an abstract of title and such proofs as are furnished by the county recorder."

the above statement had received approbation in numerous judicial and Departmental rulings, proceeded to issue an important caveat:

But those rulings give no warrant for thinking that it disturbs or qualifies important provisions of the mineral land laws, such as deal with the character of the land that may be taken, the discovery upon which a claim must be founded, the area that may be included in a single claim, the citizenship of claimants, the amount that must be expended in labor or improvements to entitle the claimant to a patent, and the purchase price to be paid before the patent can be issued. Indeed, the rulings have been to the contrary.

Id. at 306. See also Belk v. Meagher, 104 U.S. 279, 287 (1881); Capital No. 5 Placer Mining Claim, 34 L.D. 462 (1906).

[6] It is important to note that the operative statutory phrase in 30 U.S.C. § 38 (1976), is "held and worked." Since the entire purpose of section 38 was to obviate the necessity of proving formal location and recording, which acts, of course, serve to notify the world of the claimant's appropriation of the land, it was obvious that there must be some method by which other parties would be put on notice that the land was under the claim of another. Thus, a claimant was required to prove that he had held or worked his claim in addition to such other showings as were required by law.

The early cases which examined the applicability of this provision (at that time commonly referred to as R.S. 2332) clearly recognized that it embraced two separate concepts. Thus, it was generally conceded that performance of annual assessment work would fulfill the requirement

that the claims be "worked." See, e.g., Law v. Fowler, 261 P. 667, 670 (Idaho 1927); Newport Mining Co. v. Bead Lake Gold-Copper Mining Co., 188 P. 27, 28 (Wash. 1920). See also United States v. Bowen, *supra* at 402 (1979). ^{36/} If, as occurred in a number of years, assessment work requirements were suspended, compliance with the filing requirements

^{36/} There is an implicit degree of interrelation among the provisions of 30 U.S.C. §§ 28, 38, and the concept of pedis possessio. Section 28, the assessment statute, is designed to assure diligent development of mining claims and to prevent thwarting of that purpose by the mere location of claims to tie up land and let it stay idle. Powell v. Atlas Corp., 615 P.2d 1225 (Utah 1980); Smith v. Union Oil Co., 135 P. 966 (Cal. 1913), *aff'd*, 249 U.S. 337 (1919); James V. Joyce (On Reconsideration), 56 IBLA 327 (1981). Thus, a claim validly located and supported by a discovery is nevertheless open to relocation by another upon the failure of the claimant to perform annual assessment work, and may well be liable to forfeiture to the United States because of assessment work lapses if situated on withdrawn land. See United States v. Bohme, 48 IBLA 267, 87 I.D. 248 (1980).

Section 38 and the doctrine of pedis possessio have a more ameliorative focus. The doctrine of pedis possessio, as enunciated in Union Oil Company of California v. Smith, 249 U.S. 337 (1919), applies to pre-discovery claims and, in effect, provides that if a qualified person in good faith enters unappropriated public domain for the purpose of mineral exploration, such an individual will be protected against all intrusions so long as he remains in continuous, exclusive occupancy and diligently works towards making a discovery. See generally T. Fiske, Pedis Possessio -- Modern Use of An Old Concept, 15 Rocky Mt. Min. Law Inst. 181 (1969). Section 38 provides a mechanism in which the occupation and working of a claim for a period of time equal to the state's statute of limitations would obviate the need for proving formal location. This is an important concept since, as the Court held in Belk v. Meagher, *supra*, "[t]he right to the possession comes only from a valid location." 104 U.S. at 284.

Since the duty to perform assessment work attaches only upon a discovery, mere performance of "assessment work" cannot, by itself, hold a claim under pedis possessio. See, e.g., McInerny v. Allebrand, 290 P. 530, 532-34 (Cal. App. 1930).

Inasmuch, however, as the failure to perform annual assessment work would subject a claim, properly located and supported by a discovery, to relocation or forfeiture, the performance of assessment work has generally been seen as the minimum amount of work necessary to assert a claim of adverse possession under 30 U.S.C. § 38 (1976). As will be shown, *infra*, other factors will also have an impact in determining the extent of the claim.

of the suspension statutes would constitute "working" under section 38. See Judson v. Herrington, 130 P.2d 802 (Cal. Dist. Ct. App. 1942). 37/

While it was also understood that a claim must be "held" as well as "worked," Courts seldom examined the parameters of this concept beyond noting in individual cases that the specific land involved either had or had not been "held" in compliance with the statutory provisions. See, e.g., Law v. Fowler, supra; Phelps v. Pacific Gas & Electric Co., 246 P.2d 997 (Cal. App. 1952); Lind v. Baker, 88 P.2d 777 (Cal. App. 1939). The Courts did recognize, however, that "actual possession" of the claim was required and that this encompassed something more than simply performing assessment work. Thus, the Court in Law v. Fowler, supra, stated:

Actual possession therefore means something more than mere compliance with the requirement to do the annual assessment work as a basis of title under claim of adverse possession. Plaintiff has shown that at times, when doing assessment work and while the claim was worked under lease, she was in actual possession thereof. She has not shown that she was in such possession for any period of 5 consecutive years as prescribed by the statute (C. S. § 6600). The record shows that she failed to keep the boundaries of the Montezuma claim marked and indicated on the ground so as to afford actual notice. It also fails to show that plaintiff was in actual possession or occupancy of the Montezuma claim

37/ In this regard we would point out that contrary to the intimation of the Board's decision in United States v. Bowen, supra, it is the actual performance of the work, and not merely the recording of a statement that the work was done, which is dispositive of this question. See California Dolomite Co. v. Standridge, 275 P.2d 823, 825 (Cal. App. 1954); cf. Ainsworth Copper Co. v. Bex, 53 I.D. 382 (1931).

during the subsequent period when defendants initiated their rights by locating the Jennie R. claim.

261 P. at 670.

Under the above analysis, the fact that claimants therein had performed assessment work, while a necessary prerequisite to the assertion of a claim under 30 U.S.C. § 38 (1976), was not, itself, dispositive of the question of "holding." This question has traditionally been deemed to be one of fact, determinable only by reference to the specific evidence in any case. See California Dolomite Co. v. Standridge, supra at 825 (and cases cited). What we must initially examine, however, is whether the Ninth Circuit's decision in United States v. Haskins, supra, prohibits any Departmental inquiry into these matters.

Certainly some of the language used by the Court seems to foreclose examination by the Department of the applicability and extent of Haskins' section 38 claim. Thus, the Court stated:

We agree with the district court that the section is applicable to this case. The evidence unequivocally shows that Haskins and predecessors have been in possession of the ground and have worked the claims for over half a century and for much longer than five years prior to the enactment of the Watershed Withdrawal Act of May 29, 1928. Section 38 permits them to assert valid placer locations for the ground in question without proof of posting, recording notices of location and the like. [Citations omitted.]

505 F.2d at 250.

Subsequently, the Court declared:

Haskins having occupied and worked the ground for more than five years may assert placer locations without proof of recording and posting. He must, nevertheless, prove discovery of a valuable mineral because the statute has no application to a trespasser on public lands, title to which cannot be acquired by entry under the mining laws of the United States. *Cole v. Ralph*, supra; *Chanslor-Canfield Midway Oil Co. v. United States*, 266 F. 145 (9th Cir. 1920).

Id. at 251.

As our review of the evidence adduced at the prior hearings shows, it is clear that appellant's family did work portions of the land now embraced by the Haskins Quarries placer mining claim, well before the withdrawal in 1928. The question which we wish to raise, however, is whether it was the intent of the Court to rule definitively on the areal extent of the placer claim or merely to rule that a showing of holding and working had been made, leaving the actual configuration of the claim, as well as its validity, to be determined by the facts as were developed at the subsequent hearing. We must admit that, whether intentionally or not, the Court arguably appeared to foreclose this entire line of inquiry. Nevertheless, absent a clear statement that the issue of the extent of appellant's holding and working, or the permissible ambit of the claim, was beyond scrutiny of this Department, we will not assume the Court meant to preempt this Department's authority to initially determine all facts related to a claim of entitlement

to land or the minerals found therein. See generally Cameron v. United States, 252 U.S. 450 (1920); Schade v. Andrus, 638 F.2d 122, 124-25 (9th Cir. 1981). Accordingly, to the extent we think necessary, we will treat these issues as open to our review.

First of all, however, we must determine whether the Haskins Quarries placer mining claim was, in 1928, and is today, supported by a discovery of a valuable mineral deposit in a placer formation. We will now examine the record developed at the most recent hearing.

The contest complaint which issued on March 7, 1975, charged, inter alia, 38/ that, with respect to the material in placer formation:

1. There are not presently disclosed within the boundaries of the mining claim, nor have there been disclosed at any time up to the present, minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery nor is such land chiefly valuable for building stone.
2. The land embraced within the claim is nonmineral in character.

With reference to the claim, itself, the Department made seven separate allegations:

38/ The allegations relating to materials other than those in placer formation are omitted since the decision of the Ninth Circuit clearly held that the lode values could not be utilized to support the placer location. United States v. Haskins, supra at 251. In any event, as we noted above, a lode discovery would not support a placer location. See, e.g., Cole v. Ralph, supra.

1. The claim does not conform to the United States system of public-land surveys and the rectangular subdivisions thereof.
2. The claim includes more than twenty acres for each individual claimant.
3. The boundaries of the claim have not been clearly marked on the ground.
4. The land embraced within the claim is not held in good faith for mining purposes.
5. The \$100 worth of labor or improvements required by 30 U. S. Code Section 28 has not been performed or made on or for such claim.
6. It has not been worked as a claim within the meaning of 30 U. S. Code Section 38; or has not been sowed since May 29, 1928.
7. No portion is, nor since 1900 has it been, used or occupied as a millsite by the proprietor of a vein, lode, or placer for mining, milling, processing or beneficiation purposes or other operations in connection with such mines, nor has it been so-used by the owner of a quartz mill or reduction works.

On March 27, 1975, contestee filed an answer denying all of the above allegations. A prehearing conference was held on September 24, 1976, and the case came on for hearing on February 1, 1977, and continued for 2 more days.

The first witness called by the Government was the contestee, Richard P. Haskins, who was examined as an adverse witness. ^{39/} Haskins testified generally as to the operation of the claim in the

^{39/} Actually, the first witness to testify was Patrick R. Haskins, son of the present claimant. His testimony was taken out of order to accommodate his schedule. This testimony will be discussed in the general analysis of contestee's evidence, infra.

1920's and 1930's, noting that after his father's death in 1929, his mother managed the claims until her death in 1954. At this time his brother, Bartholomew, assumed the major responsibility, which appellant, himself, assumed upon his brother's death in 1962. He testified, however, that except for the period from 1944 to 1954, he always stayed in contact with what was transpiring with the claim (1977 Tr. 122). He noted that in the 1930's material was being shipped to iron foundries and to Hill Brothers Chemical (1977 Tr. 122). He noted that his brother had been responsible in 1930 for contacting the iron foundries and initiating "the flux stone business" (1977 Tr. 123).

In response to a number of questions relating to the lode/placer conflict, Haskins testified that he had never used either term in describing his claim and basically stated that it was not until Emmett Ball, the Government mineral examiner in the 1965 hearing, had spoken with him, and Hale C. Tognoni, his present lawyer, had examined the claim, that Haskins commenced referring to the claim as a placer (1977 Tr. 123-25). ^{40/} There was also general testimony that Tognoni had prepared the affidavit, dated June 2, 1972, which had been submitted to the District Court in connection with United States v. Haskins, No. 72-246-JWC (see Exh. G-2 at 233), on the basis of "months of memoranda" which Haskins had sent to him (1977 Tr. 130). Haskins was admittedly unable to define all the terms used therein.

^{40/} This reference to Ball was subsequently explained as follows: "[Mr. Ball] made the statement that it was illegal when I was selling rock there because it was placer material. This was in May of 1963." (1977 Tr. 142). See also 1977 Tr. 403; Exh. R-7.

In discussing this affidavit, however, the following colloquy transpired:

Q. What do you understand to be meant by this selecting mining?

A. Well, you can pick out as to what it is all twisted so much. If you want a piece of gneiss, which is all broken loose, and everything, if you want a piece of dolomite, if you even want a piece of quartz, that is laying there, if you want a piece of quartz --

Q. Just a moment. What does the meaning consist of with this steep wall and steep slope?

A. Well, in other words, mother nature does the mining actually by storms and it loosens it and it throws it down into the creek bottom itself of lime rock creek.

Q. Are you stating that mother nature selectively mines this quarry face?

A. Well, lets put it this way. It will bring it all down. Then, you can shake it as it hits the main flow in the creek.

JUDGE: In other words, mother nature does mine it, is that it?

THE WITNESS: Yes. That is right. That is what I would say. It has removed it from its original location.

(1977 Tr. 131-32). Haskins subsequently testified, in relation to a statement in the affidavit concerning the selective mining of limestone which was kilned and sold as plaster, as follows:

JUDGE: All right. What is your definition or idea of what selectively mined means?

What do you mean by that?

THE WITNESS: If you are going to mine out a piece of dolomite, you are going to cut a piece out.

JUDGE: So, you can go up there and you cut a piece out.

THE WITNESS: Yes. That is right.

(1977 Tr. 136-37).

Haskins also testified that, so far as he knew, there had never been any removal of materials from the two millsites (1977 Tr. 141-42). In reference to sales from the claim (which were listed with the 1968 application for patent, see Exh. R-6), appellant stated he was unable to say whether they differed from those used to support the patent application in the 1930's (1977 Tr. 169-70, 265).

Three other witnesses were called by the Government. Edward Medina, a realty assistant dealing in land administration, testified as to a search of the records of the county recorder's office to ascertain the nature and kind of proofs of labor which had been filed in reference to the lands embraced by the claim. His results were tabulated and submitted as Exhibit G-7. Medina pointed out that there was no recorded mention of a placer claim until 1968. While this compilation indicated that no evidence of assessment work or notice of holding under a suspension statute had been filed for a number of years for the lode claims, on cross-examination, when Medina was confronted with evidence that documents had been recorded for those years (see Exh. R-12), he admitted that the recorder's office had obviously made some errors (1977 Tr. 198-200).

James R. Mason, Jr., a mineral examiner, testified as to his physical examination of the site, and a number of photographs showing the claim were put into evidence. With specific reference to the area comprised by the streambed, Mason testified that there were 2.44 acres inside the flood plain on the Lap Wing and 1.23 acres inside the flood plain on the Lady Helen (1977 Tr. 223-24). Based on these figures, Mason then estimated the tonnage of carbonate rock on three different assumptions relating to its presence as a constituent component of all the material in the streambed, viz., 1 percent, 5 percent, and 10 percent. His conclusions were that on the Lady Helen, depending upon presumed percent of carbonate rock, there would be 29.72 tons per foot of depth (tpf), 148.6 tpf, and 297 tpf, respectively. For the Lap Wing, the estimated tonnage was 59 tpf, 295 tpf, and 590 tpf, respectively. His calculated figure for the total flood plain, at a 10 percent estimated presence of carbonate rock, was 887 tons per foot of depth (Exh. G-13). Mason's calculations also showed that, assuming 3 feet of depth on the Lap Wing, there would be 11,800 cubic yards on the Lap Wing, or roughly, 17,700 tons.

Finally, Gerald E. Gould, Regional Mining Engineer for the Forest Service, testified. His testimony was primarily directed to the physical situs of the claim. He stated that, based on the description in a notice of the claim filed by appellant in the county recorder's office on May 2, 1968 (Exh. R-1), he had attempted to plot the claim. Based on his calculations, he stated that there was a descriptive error of over 46 feet, and that the description would be completely

inadequate for the purposes of passing title (1977 Tr. 238-39). Similarly, he found that the description which Haskins had filed in his answer to the Government suit in ejectment (see Exh. G-2 at 19), had a closure error on the order of 350 feet (1977 Tr. 253). He admitted that he had not gone on the grounds of the claim in making his calculations (1977 Tr. 257).

Contestee presented the evidence of three witnesses: Richard Haskins, the claimant, Patrick R. Haskins, his son, and Dudley L. Davis, a registered geologist and mining engineer.

Patrick R. Haskins, who is employed by the California State Department of Transportation as a heavy equipment mechanic, testified that he also worked as a mechanic operator for his father. He stated that he was on the claim regularly from 1955 to 1968, and actually helped his father work the claim from 1966 to 1968. In 1968 he entered the military service. Subsequent to 1972, when he left the service, he has been responsible for maintaining the equipment and helping out with road repairs, though since his marriage he has had less time to help (1977 Tr. 48-50).

He described the mining operation as basically being one in which they hauled material from the streambed to a working area near the highway where it would be accessible to trucks. There it would be stockpiled and loaded onto pallets, bound with chicken wire (1977

Tr. 51-52). He stated that mining was primarily down in the canyon and explained how the supply of minerals was replenished as follows:

A. During rain storms or we had earthquakes, that would knock hundreds of tons of rock down. However, normally if we wanted a specific rock out of this, we would take the D-8 and build the road up to it and take a cut out of it. When the rock falls, it comes into the creek and we pick it up.

However, usually something of this matter, we wouldn't have to go right to the face or whatever, because enough of it is in the creek already.

Q. It keeps falling off the creek?

A. Keeps falling from the lode or the face of the deposit.

Q. Well, after the earthquake, then, a lot of rock came down into the canyon?

A. Yes. In some areas it literally filled up the canyon.

Q. After each storm?

A. Okay. Those materials that have been knocked down by the earthquake had been washed down the creek. Usually your sand and dirt and what have you would be washed off exposing the boulder and your larger rocks.

Q. Well, each year then your road would be covered with the material washed down from the canyon?

A. Yes.

(1977 Tr. 54-55). He mentioned many times in his testimony that while the quarry faces were the source of the materials, most mining activities consisted of culling the dolomite which the rain had washed into the canyon (1977 Tr. 69, 78, 81, 84-85). He stated that his father did not engage in drilling or blasting because of bad experiences he

had had on other properties (1977 Tr. 73-74). He also stated that insofar as he could recollect, nothing had ever been removed from the two millsites, though they were used for stockpiling (1977 Tr. 66).

While Patrick Haskins made a number of references to veins, including a statement that "the veins are running parallel with the creek in some areas" (1977 Tr. 89), he later explained that he used the term "vein" interchangeably with "outcropping" and that he was also using that term to refer to material after it was dislodged from an outcropping (1977 Tr. 106-08). He admitted, however, that he had no difficulty identifying the dolomite upon the hill.

The claimant, Richard P. Haskins, in addition to testifying as an adverse witness for the Government's case, also provided testimony for the contestee's side. First, Haskins described the history of the claims. He noted that while lime had been produced from the claims in the early years, production ceased around the late 1880's and that by 1915 the lime kilns were used as storage sheds (1977 Tr. 283-84).

He described the work done from 1900 to 1920 as primarily tunnel work looking for gold, silver, and precious metals. He also noted, though, that some dolomite was used as chicken grits, and cobble stones were sold for building houses (1977 Tr. 291-92). He subsequently stated that both granite and dolomite were used for chicken grits (1977 Tr. 354). Haskins focused particularly on the period between 1918 and 1928.

Q. Then in 1918 and 1929 your dad was evidently managing and operating all the way through there?

A. Yes.

Q. What other kinds of rock were you selling? Now, we have chicken grits; you said dolomite?

A. Yes.

Q. What were you doing with that?

A. That was dolomite that was sold to -- oh, they were sold to companies down in town here or they would process it themselves. I don't know exactly of this production here.

JUDGE: What kind of companies were they?

THE WITNESS: They were lime product works. They would crush the material. The companies or one of the companies were right by the gas works over there.

(1977 Tr. 305-06). Concerning recordkeeping, Haskins testified that he was the bookkeeper from 1930 on, but most of the records were destroyed after his mother's death.

Haskins then recounted more recent mining activities on the claim noting that most of the material has fallen into the creek over a period of years and that this process has been accelerated by storm waters. There have been times, however, when crowbars and dynamite were used to help a rock down the hill or to crack larger boulders (1977 Tr. 332-33, 396-97). He noted that an earthquake in 1970 deposited a lot of material in the creekbed (1977 Tr. 342). He stated that his present sales consist primarily of dolomite with occasionally other rocks being sold (1977 Tr. 379).

Haskins was then examined concerning the similarity of the sales submitted as an exhibit to the 1968 placer patent application (see Exh. R-6) with those previously submitted in support of the lode claims. He indicated that the first 12 entries in exhibit R-6 were not duplicates of sales submitted in support of the lode claims in the 1965 hearing (1977 Tr. 394-95), though the rest of the sales listed were referred to in the 1965 hearing (1977 Tr. 409).

On cross-examination, Haskins was asked what he understood was meant by the term "building stone." The following discussion transpired:

A. Building stone, to my way, is to building walls, ornamental things, fireplaces, rock gardens, or even houses. The facing of houses, also.

Now, they use[d] to build them out of it but now they just use it as facing.

Q. Well, the answer may be obvious to you, but I would like your understanding.

Would you include material used in terrazzo?

A. Well, that could be because it is used as a flooring.

Q. It is essentially small pieces?

A. That is correct.

Q. The size of gravel?

A. Yes.

Q. You would regard that as building stone?

A. That would be processed building stone to me. It is put together.

Q. It could equally be any kind of stone processed, couldn't it?

A. Yes, but you have to actually -- terrazzo is made for the actual beauty and durability of it. You can't use all kinds of stone.

Q. Is it the use of material as terrazzo which in your mine [sic] makes it building stone?

A. Yes.

Q. I would infer that you would not include flux as building stone, would you?

A. Flux stone can be used as building stone.

Q. Yes, but when it is used as flux it is not used for building, is it?

A. That is correct.

Q. All right.

A. There is nothing left of it after it is used.

Q. You would not consider, I take it, stone used metallurgically as building stone?

A. I would.

Q. You would?

A. You can use it for that.

Q. Well, do you mean that anything which can be used in a building is building stone?

A. Any rock material.

Q. Which can be used in a building?

A. That is right.

Q. Is any rock material which can't be so used?

A. Well, soft sandstone or a decomposed granite.

Q. Other than that, almost any stone could be a building stone; is that correct?

A. If it is a presentable stone. It all depends as to what they want and as they want it.

Q. I see. You include stone used for landscaping as building stone?

A. Yes. That can be used to build a wall or make a design or anything.

Q. What about roof granulars?

A. Roof granulars is actually most of it, is on your white type of material.

Q. But do you regard that as building stone?

A. It can be used for building stone.

Q. What about chicken grits?

A. Well, chicken grits can be used for building stone if it is hard enough.

Q. What about fillers?

A. Fillers is a filler material. It is your certain building material like dolomite ground up two or three hundred.

Q. I take it you include these things I have enumerated as building stone provided they could be used as building stone?

A. They can be used both ways. Some of them can.

(1977 Tr. 415-18).

Haskins admitted that the material which he presently sells is the same material which he had always sold (1977 Tr. 421) but that he had no idea of the amount of material sold, either before or after 1930, which was actually used in building (1977 Tr. 427). He stated that he had found no mineral values on the millsites (1977 Tr. 445). He also stated that the "decorative stone" consists of dolomite, gneiss, and granite-type of materials (1977 Tr. 446).

The last witness called by contestee was Dudley L. Davis, a registered geologist and mining engineer, who had considerable mining experience with both lode and placer claims. He first testified as to his general impression concerning lode and placer locations. Thus, concerning a question relating to whether the rock in place is locatable on the vein, he responded: "The valuable mineral which is contained in the vein is what you are actually looking for or locating for" (1977 Tr. 464). He subsequently elaborated on his understanding:

Q. Then you are talking about this vein being between some walls and rock in place. What do they mean by that?

A. The rocks there that I am talking about is the country rock which is distinctly different from the vein.

Q. Well, the vein can be any number of types of materials; is that correct?

A. That is correct.

Q. But is it the vein itself that is locatable or the gold?

A. I said that, in my opinion, it is the valuable minerals as contained within the vein which you are actually locating, which the claimant actually claims the valuable minerals.

(1977 Tr. 474-75).

Davis noted, however, that building stones were locatable in placer form (1977 Tr. 476, 480). Davis also attempted, at a number of points, to define what he meant by "building materials." We set forth a consolidated version of his attempts.

BY MR. TOGNONI:

Q. When you spoke of building materials being locatable, what do you mean by building materials? What are some of the things included on that?

A. Building materials include granite, limestone, dolomite, schist, gneiss, and any other stone which are hard enough to be used in building.

(1977 Tr. 481).

[BY MR. LAWRENCE]

Q. All right. Now, you have used the expression building stone, in one or more places. What do you mean by that?

A. I think I defined that as any stone which is suitable for building, either because of its hardness or its beauty or its texture. Whatever appeals to a person that wants to use it in a building or garden or whatever.

Q. Do you imply in your definition, sir, that the stone can be so used?

A. Not necessarily. It should be useful as building.

Q. But it is acceptable use?

A. Yes.

(1977 Tr. 502).

BY MR. LAWRENCE:

Q. Okay. Going back, did you include terrazzo as a building stone?

A. Terrazzo are the chips which are made from building stone.

Q. I see.

A. They are put into cement and then they are polished and used for building purposes.

(1977 Tr. 553).

Davis also explored, in some detail, his perception of the proper mode of locating limestone.

Because of its importance, we set out this exchange in extenso.

[BY MR. LAWRENCE]

Q. Now, do you have any knowledge as to whether or not limestone has been held properly locatable as a lode?

A. Yes. And it is my understanding that it depends on the use to which limestone is to be put.

Q. Do you believe it has no relationship to the mode in which it occurs in the ground?

A. Rather the use to which it has been put is my understanding of whether you should locate it as lode or placer.

Q. Well, would you explain that more fully? What is the difference?

A. My understanding is that if the material is to be used for chemical purposes you are not supposed to locate it as a placer claim.

Otherwise, it is my understanding that it should be located as a placer claim.

Q. But conversely it would be your understanding that it should be located as a lode?

A. If you do not use one you should use the other, correct.

Q. You would not automatically say that a lode location was improper?

A. I don't know what they are going to use it for, you see.

Q. But without further inquiry you would not question a lode location, would you?

A. A lode location of a limestone deposit?

Q. Yes.

A. I would question it immediately because if I were locating it I would locate it as placer.

However, if the material was to be used for chemical purposes, then, it is my understanding that it is properly located as a lode.

Q. You would include material used as flux stone?

A. I suppose so, although it is a matter of judgment of the locator.

Q. I mean you would regard that as a chemical use?

A. Yes.

Q. And the same would be true of a metallurgical use, is that the same thing?

A. Same thing.

Q. General chemical use as being the same thing?

A. I say it is a matter of -- you don't know when you locate these claims what it is going to be used for. You think it is valuable for one thing and sometimes it turns out to be valuable for another.

* * * * *

BY MR. LAWRENCE:

Q. Now, in the event that a limestone vein or lode has been located as a lode claim and is used for chemical purposes, the entire body of the lode is utilized; is that correct?

A. It may or may not be.

Q. It can be used?

A. We are talking about a theoretical situation now?

Q. Yes.

A. It might be used regardless of how it is located, either properly or improperly. They might mine the entire body if that is your question.

Q. Yes.

A. Okay.

Q. In that event, the valuable continuancy is the limestone itself; is that right?

A. The calcium carbonate that is in the limestone.

Q. Not a single component but in the limestone?

A. No. The limestone has a little dolomite and a little this and a little of that.

Q. Well, those are impurities?

A. You can see the entire amount they would not be so used. They would cast out the impurities that was conveniently possible.

Q. In some instances they would be further retained, right?

A. Yes.

(1977 Tr. 513-17).

Subsequently, Davis elaborated further on his contentions:

BY MR. LAWRENCE:

Q. Do you agree that dolomite deposited at a zone or mineralized rock lying within boundaries separating it from neighboring rock, may be regarded as a lode?

A. It may be by the uninitiated.

Q. By that you mean persons who have not been initiated by court's decision?

A. No. Who has not been through a course of geology because a sedimentary bed is always bounded by an entirely different rock.

If that sedimentary bed is then uplifted because it stands at a high angle so that its original sedimentary characteristics are obliterated, the uninitiated might consider it a lode.

Does that answer your question?

Q. Yes. I take it then you do not use the word lode to describe the kind of formation I have just described to you?

A. No. Not if I can determine that it is in or was in fact a sedimentary bed in its initial stages.

(1977 Tr. 520).

While Davis admitted that the materials found on the claim were of common and widespread occurrence, he argued that the claim provided a convenient gathering together in one spot of various varieties of stone (1977 Tr. 508). When asked to enumerate the deposits which he thought were valuable he stated "schist, gneiss, quartzite, and dolomite and perhaps some others" (1977 Tr. 544). When asked of the distinction between the deposit and country rock, Davis declared "what you are calling the country rock I am calling building stone. There is no distinction in my mind" (1977 Tr. 541).

At one point, Davis attempted to shift the emphasis from dolomite. Thus, he declared: "I might state that [there] has been a great deal of emphasis placed on dolomite, but there has also been considerable material in the nature of building stone as decomposed granite and

other stones which have been mined from the property other than dolomite" (1977 Tr. 524). In a later discussion concerning Davis' expressed opinion that a discovery of the deposit existed prior to 1929 the following exchange took place:

Q. And in your opinion did this discovery take place prior to 1930?

A. I am sure it did, yes. The records show that they did mine and ship this deposit before 1930.

Q. Now, did the record show any shipment of gneiss prior to 1930?

A. They referred to it as building stone.

I have no way of knowing whether it was gneiss, schist, quartzite or, they do mention shipping dolomite. However, as to the other building stones, other than the chicken grits, I believe he called it chicken grits, which was actually or technically called chicken liquor.

(1977 Tr. 545).

In sum, Davis' testimony was that the deposit of building stone was properly located as a placer and is now, as it was in 1930, supported by a discovery.

With Davis' testimony, the hearing closed. Both sides subsequently filed briefs, and on December 30, 1977, Judge Morehouse rendered his decision. First, he reviewed the seven specific charges which we set forth earlier and, for various reasons, ruled against the Government on every one.

41/ Then, Judge Morehouse turned to the

41/ We will discuss various of these points, infra.

question of the existence of a discovery of a placer mineral.

Judge Morehouse declared:

This is the crucial issue and, having reviewed the entire record, it is my conclusion that there has been disclosed within the boundaries of the claim placer materials sufficient in quantity, quality, and value to constitute a valid discovery. The record shows that the dolomite lode deposit on the claim consists of a series of lenses of dolomite in the gneissoid granite from 30 to 40 feet thick and from 100 to 200 feet in length. Tragitt and Davis estimate the quantity of dolomite in this formation to be a minimum of 900,000 tons. The Ninth Circuit in Haskins, supra, specifically held:

Whatever the merits of Haskins' claimed placer locations, their validity cannot be supported by proof of the presence of dolomite or dolomite limestone in lode formation. Haskins cannot use the same material that he relied on as a discovery of valuable mineral under his lode locations to support his present placer locations.

However, in addition to the material in lode formation described above, both Tragitt and Davis estimated that there was a minimum of 100,000 tons of decorative stone marketable for use as roofing granules, terrozzo [sic] chips, and decorative stone in walls, rock gardens, fireplaces, and patios. It is recognized that records of sales of placer material during the 1920's are not voluminous and most of the sales used in support of the patent application for the lode claims are used in the placer patent application. That they were so used does not alter the nature of the rock formation from which these sales were made and the record is clear that at least some of those sales for which records do exist, and many other sales for which records do not, were made from rock in placer formation. Many of the records were lost following Mrs. Haskin's death in 1954 and others were lost in a fire. Of particular significance is the fact that nowhere in this record is there any testimony by a Government mining engineer or geologist to the effect that this was not a valuable placer mineral deposit. Neither Mr. Mason nor Mr. Gould, both mining engineers who testified for the Government, were asked this question. In addition, Mr. Emmett Ball, who first advised Haskins that placer materials were being sold from a lode claim in 1963, was present in the courtroom during the hearing and was not called as a witness. The only reasonable inference to be

drawn is that all three considered the placer material on the claim to be a valuable mineral sufficient in quantity, quality, and value to constitute a discovery.

(Decision at 24-25).

Our de novo review of the entire record convinces us that Judge Morehouse misinterpreted both the evidence presented at the 1977 hearing and the Ninth Circuit's decision in United States v. Haskins, supra. In addition, we find the inferences which he sought to draw unsupported by the record. Finally, we think it clear that the Haskins Quarries placer mining claim, even assuming it ever existed, was not supported by a discovery of placer material in 1928, when the land was withdrawn, nor is it today, and that the purported claim must be determined a nullity.

It is essential to realize that contestee and his expert were actually testifying about two separate types of deposit. First, they referred to loose rocks deposited in the stream bed by the natural action of erosion and, at least lately, by earthquakes. The physical extent of this deposit is actually quite limited, testimony from Mason indicating that it embraced only 3.67 acres out of the total 85 plus acres sought. We will refer to this as the detrital deposit.

There is also, however, another deposit which is involved. This claimed deposit is coextensive with the original four mining claims because, of course, it is exactly the same deposit which has been

litigated since at least 1933. ^{42/} Contestee's position as regards this deposit, which we will refer to as the source deposit, is simply that it should have been located as a placer claim rather than as lode claims. While these two deposits are clearly related, it is necessary that we differentiate between the two in our analysis. We will therefore examine first the source deposit.

A review of the record of all the proceedings heretofore held may leave the impression that over the period of adjudication contestee's experts have been irreconcilably contradictory in their testimony. Thus, Baverstock, claimant's expert in 1933, stated that the deposits were lenticular and "are most decidedly in place" (1933 Tr. 10), and Mallery, another expert testifying for the claimant, stated "I am stressing the continuity of the vein from a geological standpoint" (1933 Tr. 16). On the other hand, Davis testified in 1977 that the source deposit was properly locatable as a placer. Although these witnesses seemingly disagree on the nature of the deposition, they actually do not. The key to reconciling the apparent contradictions rests in recognition of the fact that Davis was of the opinion that the claim was and had always been located for building stone, which by statute must be in placer form, whereas the earlier experts merely testified on the form of deposition, which happens to be lode.

^{42/} With respect to the lands embraced by the millsites, however, we shall show that there is no possible way that appellant's placer claim, consistent with both appellant's earlier arguments and most recent testimony, could embrace this land.

As we noted above, lands chiefly valuable for building stone must be entered as placers under the Building Stone Act, supra. Where, however, a limestone deposit is valuable for its chemical or metallurgical properties, it is the nature of the deposition which determines the proper form of location. Davis clearly had reference to this dichotomy when he testified, in response to a question of whether or not limestone has been held properly locatable as a lode, "it is my understanding that it depends on the use to which limestone is put" (1977 Tr. 513). 43/ Davis was not denying that the source deposit was rock in place. 44/

43/ At this point we would emphasize that Davis' understanding is somewhat flawed, though understandably so. Davis' testimony clearly showed that he was of the view that a lode or vein deposit was only located for the mineral carried therein (1977 Tr. 464, 474-75). As we noted supra, while this was, at one time, the view of the Department, as such early cases as Henderson v. Fulton, supra, and Jefferson-Montana Copper Mines Co., 40 L.D. 320 (1912), attest, subsequent Court and Departmental decisions have long since necessitated abandonment of this concept. See, e.g., Dunbar Lime Co. v. Utah-Idaho Sugar Co., supra; Webb v. American Asphaltum & Mining Co., supra; United States v. Bowen, supra.

If, however, one adheres to this old interpretation, the conclusion which must flow is that limestone valuable for the limestone, itself, is only locatable as a placer, since it cannot be a lode. Thus, while Davis obviously recognized that a number of decisions exist which have affirmed the propriety of locating a limestone deposit of chemical or metallurgical grade as a lode, he has misinterpreted the scope of these rulings. There is no rule, despite Davis' belief (see 1977 Tr. 513-15), that limestone valuable for chemical purposes must be located as a lode. Rather, the rule is that such a deposit is properly located according to the form of its deposition. See Vivian Hemphill, supra; United States v. Wurts, A-30945 (Jan. 23, 1969). As an example, if the detrital deposit herein was valuable for chemical purposes it would be locatable as a placer, not a lode, because it is a placer deposit. Since Davis does not recognize the propriety of locating limestone as a lode (the values being the vein itself, rather than what the vein carried), he has misread the Departmental rulings on this point.

44/ The closest Davis came to actually asserting that the deposit was not in lode form occurred in this testimony relating to sedimentary rock (1977 Tr. 520). To the extent Davis is of the belief that the fact that the deposit may have originated as a sedimentary bed precludes its location as a lode, he is wrong. See United States Gypsum Co., 60 I.D. 24 (1947); San Francisco Chemical Co. v. Duffield, supra. As was noted in McMullin v. Magnuson, 102 Colo. 230, 239, 78 P.2d 964, 969 (1938), "by no statute or judicial pronouncement is the origin or method of formation of a mineral body controlling in determining whether the ground is subject to location as a lode or placer."

Rather, he was contending that because the source deposit was building stone, it was, of necessity, located as a placer. If the lands embraced by the dolomite deposit are now, and were in 1928, chiefly valuable for building stone, there can be no gainsaying that conclusion.

[7] When the records of the hearings held prior to 1977 are examined, however, it becomes impossible to sustain the argument that the land was chiefly valuable for building stone at any time until the most recent past, if ever. 45/

In the various proceedings which occurred between 1930 to 1965, the claimants and their witnesses testified to uses to which the dolomite was put, or for which it was suitable, ranging from floors, roofing paper, plaster, and golf courses (1930 Tr. 29), chicken grits and gravel for mosaic terrazzo (1930 Tr. 54), terrazzo, stucco, chicken grits, sound proofing, in soda plants and the sugar industry (1933 Tr. 25-26, 34, 38), crushed for use as additives and filters (1965 Tr. 126), cement, tanning, glass, plaster, cow feed, and paper (1965 Tr. 161). But by far the use most consistently mentioned has been as flux (1930 Tr. 29, 74; 1933 Tr. 34; letter of July 19, 1935, from Tessie Cooke-Haskins to Secretary Ickes; 1965 Tr. 125-28, 161). The simple fact of the matter, however, is that use of dolomite for flux is simply not

45/ We note that the repeated comments relative to the value of the land for subdivisional purposes certainly raise questions as to the principal value of the claim, even assuming the presence of a discovery of a valuable placer mineral deposit. See generally United States v. Kosanke Sand Corp. (On Reconsideration), 12 IBLA 282, 299-302, 80 I.D. 538, 547-48 (1973).

building stone use. Indeed, of all the myriad uses for this stone mentioned over this period only three are even arguably building stone uses: terrazzo, roofing granules, and stucco. Even assuming, arguendo, that these are building stone uses, nothing in the record generated prior to 1968 could possibly support the conclusion that the land was chiefly valuable for building stone. 46/ This is so even without taking into account the fact that Hearing Examiner Holt, who considered combined sales for all possible uses, found the deposit on the Lady Helen depleted by 1965, and no existing market for any other deposit within the claims.

In any event, we note that the Ninth Circuit specifically directed that "whatever the merits of Haskins' claimed placer locations, their validity cannot be supported by proof of the presence of dolomite or dolomite limestone in lode formation." United States v. Haskins, 505 F.2d at 251 (emphasis added). Even were contestee able to show that the source deposit contained a marketable supply of building stone, such a deposit would nevertheless be in lode formation, and thus could not, consistent with the directions of the Court of Appeals, properly be considered in support of the placer claim.

46/ We wish to clearly emphasize that we are assuming only for the sake of argument that the sales of dolomite herein for stucco, roofing granules, and terrazzo would be classified as building stone uses. It is arguable whether any of these uses relate to the purposes for which the Building Stone Act was adopted. See Dunbar Lime Co. v. Utah-Idaho Sugar Co., supra (limestone useful in the making of cement not locatable under the Building Stone Act); Stanislaus Electric Power Co., 41 L.D. 655 (1912) (Building Stone Act applies to stone of special value for structural work and other recognized commercial uses).

Thus, we are left to examine the detrital deposit. We think it clear that both the Ninth Circuit and Judge Morehouse were primarily concerned with this deposit. It is obvious to us that, to the extent that this deposit was created and replenished by the natural forces of erosion, water runoff, and earthquakes, the deposit is in clearly placer formation (though its physical area is necessarily quite limited).

Our problem derives, however, from the fact that despite both the Tragitt affidavit and the 1977 testimony of both contestee and Davis, it is impossible to read the early records as supporting a contention that this detrital deposit has been the historical focal point of mining activities.

In contradistinction to the laudations directed to the effect of water runoff in the 1977 hearing, such storm waters were seen as a positive menace in the earlier testimony. Thus, in 1933, in reference to the "original" cut on the Lap Wing, Tessie Cooke Haskins stated that "it was worked for several years and a cloud burst covered it up" (1933 Tr. 23). Concerning a recent cut she stated "[s]ome of that had been mined from this original cut the storm waters would come down and we had to protect it where they had mined and there was a pile of rock on high ground, I would say ten tons taken from this cut that is there now" (1933 Tr. 25). Subsequently, she spoke of another cut which had been "obliterated" by the rain storms (1933 Tr. 25). While there was passing mention of wash "float" by Jesse Tiffany (1930 Tr. 53), he also expressed the view that "most of the lime had been removed" (1930 Tr. 55).

Regardless of the methods claimant may use for mining today, it is clear that historically cuts were blasted in the mountain side (Tiffany, 1930 Tr. 53; Bartholomew Haskins, 1933 Tr. 32). The blasting of lode material into a gully does not transform the material into a placer deposit. Clearly, a certain percentage of the float got into the creekbed through the affirmative intervention of the claimants and not the benign forces of nature.

We are not unaware that the testimony at the first two hearings did not relate to either the Lady Helen or Roger Williams claims. And we do recognize that various statements were made, particularly by Friedhoff in 1936, which indicated that the Lady Helen (and possibly the Roger Williams) lode claims were valid. We also note, however, that not only were these statements naked opinions unsupported by any evidence of record, but that claimants never attempted to follow through and actually patent those claims. When they were finally tested at a hearing in 1965, Hearing Examiner Holt found that such accessible deposits as may have existed had long since been mined out. Only after this decision does the detrital deposit (like a veritable Phoenix) arise from the ashes of the claims.

Indeed, there is a certain disingenuousness to claimant's case. Claims originally located for gold, silver, and vanadium through the passage of time became metamorphosed into lode dolomite claims, and finally take on shape as a single placer claim for schist, gneiss, quartzite, decomposed granite and some dolomite (1977 Tr. 524, 544). These

protean claims have, over the years, changed in type, name, number, mineral nature (millsites are now part of a placer claim) and deposit sought. Indeed, the only aspect which has remained constant is the situs of the land and its proximity to Los Angeles. Long ago, though to a far less egregious extent, the Department was faced with a similar case, Clark v. Ervin, 17 L.D. 550 (1893). In Clark v. Ervin, supra, it was contended that a location for building stone made prior to the enactment of the Building Stone Act, which location had clearly been made to acquire the building stone located thereon, could nevertheless be validated by the subsequent discovery of fire clay. Therein, Secretary Smith noted:

The question therefore to be considered is whether this location may be sustained by reason of the existence of fire clay. I do not think it will be seriously contended that if the location made for the building stone fails because unwarranted in law, the locators or their assigns can be permitted to claim a valid location upon the subsequent discovery of some material that is subject to entry under the placer law. In other words if the locators now insist upon the validity of their location by reason of fire clay they must show that the location was made for that purpose and none other. The placer mining law was not intended to be a catch-all system of taking public lands, allowing parties to play fast and loose to suit their own caprice. [Emphasis supplied.]

Id. at 552. Secretary Smith analyzed the record and, determining that the claim for fire clay was but an "after-though" of the claimants, held that the claim was properly nullified. Id. at 553.

We expressly find that the building stone argument which claimant has advanced herein was "thrown in as an afterthought and not in good

faith." United States v. Haskins, *supra* at 252. Appellee may well be selling decorative stone today. But there can be no question that during the period for which discovery must be shown, 1923 to 1928 (in order to prevent the Watershed Withdrawal Act from attaching), there was no discovery of valuable placer material, nor could the land be said to have been chiefly valuable for building stone. 47/

Normally, having reached a decision which would be dispositive of the ultimate question before us, we would not further examine other subsidiary or independent questions which an appeal might present. However, considering the lengthy and tortured path which this case has already traversed, it is our intention to specify other deficiencies which are manifested in this record. Should, on appeal, a Court determine to overturn our analysis, it would therefore not be necessary to remand this case to the Department for yet further protracted hearings and appeals. Rather, having expressly ruled on each ground, the instant claim would be ripe for patent, needing only compliance with such procedural requirements as remain unaccomplished. There should come a time when even the most inventive litigation comes to an end.

47/ Insofar as Judge Morehouse sought to draw inferences from the failure of the Government experts to assert that the mineral deposit was lode in form, we think that such action would be questionable in even the most optimal circumstances. Inasmuch as no one, including Judge Morehouse, saw fit to question the two experts who testified on this point, it seems passing strange to impute conclusions which could have been directly ascertained. As far as the failure of Ball to testify is concerned, we see equally little justification for the inference Judge Morehouse ascribed to this non-event.

[8] We turn, therefore, to the question of acreage within the Haskins Quarries placer mining claim. We noted above that the Supreme Court expressly held in Cole v. Ralph, *supra*, that 30 U.S.C. § 38 (1976) in no way modified the amount of acreage which can be embraced within a single claim. 252 U.S. at 306. Under the mining laws, specifically 30 U.S.C. § 35 (1976), no placer location can include more than 20 acres for each individual claimant. Up to eight individuals, however, may join together and thereby locate an association placer with a maximum size of 160 acres (20 acres per individual). See 30 U.S.C. § 36 (1976).

The Haskins Quarries placer claim embraces 85 plus acres. In order for a single claim to obtain that dimension, there must be five colocators. In the patent affidavit filed with BLM in 1968, there were only four locators listed: Richard P. Haskins, Sr., Tessie Cooke-Haskins, Bartholomew Haskins, and Richard P. Haskins, Jr. Under this allegation, even assuming that it could be shown that these four individuals had held and worked the land embraced by the claim, not more than 80 acres could have been included in a single claim. This point apparently occurred to contestee's counsel, since great pains were taken at the hearing to add on the name of Margaret Maude Haskins as another locator (1977 Tr. 321).

We would point out the Bartholamew Haskins was born in 1905, Margaret Maude Haskins in 1909, and Richard P. Haskins, Jr., in 1911. Thus in 1923, by which date adverse occupancy must have begun, the

children would have been 18, 14, and 12 at the oldest. We recognize, of course, that minors may locate claims, and that parents may locate claims on their behalf. see West v. United States, 30 F.2d 739 (D.C. Cir. 1929); Thompson v. Spray, 14 P. 182 (Cal. 1887); 43 CFR 3832.1. What is involved here, however, is not merely location of a claim as provided by 30 U.S.C. §§ 23 and 35 (1976), with the requisite acts of posting and recording as contemplated by 30 U.S.C. § 28 (1976). This, rather, is a claim grounded in adverse possession in which a showing of actual possession is a necessity.

The record is somewhat obscure concerning the onground activities of Margaret Maude Haskins, Bartholomew Haskins, and Richard P. Haskins, Jr., during the critical years. With respect to Margaret Maude Haskins, claimant testified in the 1977 hearing that, while she was present on the property during weekends and the summer (1977 Tr. 287), he could not remember what she was doing (1977 Tr. 294), though some cooking was involved (1977 Tr. 315). Concerning his own activities, contestee stated that he was on the claim as early as age 4 (1977 Tr. 280), that he started physically working on the claim by age 7 (1977 Tr. 119, 285), and that some of his work included "helping and building trails" (1977 Tr. 155). Because he was attending school in Los Angeles, he, too, was only on the land on weekends and during the summer (1977 Tr. 311). In reference to the type of work he performed, he stated "it was my job to get up and milk the goats while [Bartholomew] slept and he went to work" (1977 Tr. 286). There were additional references to Bartholomew Haskins indicating that he was in

the armed forces, and subsequently pursuing an education from 1918 to 1924 (1977 Tr. 310), after which he became involved, on a day-to-day basis, with the claims.

While we are willing to accept this evidence, meager though it may be, as establishing the necessary "holding and working" of Bartholomew Haskins for the requisite period (1923-28), we find the evidence insufficient to establish claimant's necessary possession. Sporadic weekend visits and summer vacations, when viewed in light of appellant's young age at that time, will not support a finding that the claimant, personally, "held" or occupied the claim for 5 years prior to the Watershed Withdrawal Act. And there is no evidence, whatsoever, that claimant's sister ever "worked" the claim within the meaning of 30 U.S.C. § 38 (1976). Contestee has simply not established that Margaret Maude Haskins, or Richard P. Haskins, Jr., occupied and worked the land in conjunction with their parents during the necessary period.

We would point out that this whole question would have been avoided if Haskins had alleged three separate placer claims, since there is no limit to the number of 30 U.S.C. § 28 claims that can be simultaneously alleged. Indeed, there is sufficient confusion in the Ninth Circuit opinion to raise questions whether the Court clearly understood that there was only one placer claim. Thus, the Court's decision stated that "Haskins having occupied and worked the ground for more than five years may assert placer locations without proof of recording and posting." 505 F.2d at 251 (emphasis supplied). Haskins, however, was claiming only one location.

This is not a matter of technicalities. Had Haskins asserted more than one location he would have been required to show the individual validity of each claim. See United States v. Williamson, 45 IBLA 264, 278, 87 I.D. 34, 42 (1980); United States v. Colonna and Company of Colorado, Inc., 14 IBLA 220, 226-27 (1974). He would have been required to show the expenditure of \$500 per claim prior to the issuance of patent. See 30 U.S.C. § 29 (1976). And he would have been required to show that assessment work had been performed for the benefit of each of the placer claims.

We have examined the record and find no plausible way of holding that Margaret Maude Haskins or Richard P. Haskins, Jr., occupied any part of the land to the exclusion of others, either individually or in conjunction with their parents. Weekend visits and simply living on the claim are not "holding and working" within the meaning of 30 U.S.C. § 38 (1976). Appellant, having made the assertion of a single placer claim, must be limited to the natural and legal consequences thereof. Accordingly, we would hold that, even if the claim were to be found valid, to the extent that it exceeded 60 acres, such excess would be invalid under the dictates of Cole v. Ralph, *supra*.

[9] We also wish to focus on the question of the propriety of having this placer claim embrace land formerly within two millsites. In its decision of May 18, 1972, the District Court, in ruling in favor of contestee's right to allege a placer location under 30 U.S.C. § 38 (1976), noted: "There is after all a difference between a lode

claim and a placer claim. * * * Both types of claims can, of course, be made upon the same property and can co-exist, even though in different ownership." United States v. Haskins, No. 72-246-JWC (C.D. Cal. 1972) at 3-4. This statement is correct, so far as it goes. But what neither the District Court nor the Circuit Court examined was the more particular question whether a millsite claim is compatible with a mining claim for the same land. The answer is clearly in the negative.

By statute, millsite claims may only be made on nonmineral lands. See 30 U.S.C. § 42 (1976). This has been the consistent ruling both of the Courts and the Department. See Worthen Lumber Mills v. Alaska Juneau Gold Mining Co., 229 F. 966 (9th Cir. 1916); Walsen v. Gaddis, 194 P.2d 306, 318 (Colo. 1948); Cleary v. Skiffich, 65 P. 59 (Colo. 1901); United States v. Silver Chief Mining Co., 40 IBLA 244, 248 (1979); Emerald Oil Co., 48 L.D. 243, 245 (1921). In United States v. Moorhead, 59 I.D. 192 (1946), the Department examined an argument similar to that implicitly pressed herein by contestee -- that a millsite location was not adverse to a subsequent placer location. In Moorhead, the Department noted:

Another contention of Moorhead is that the Coin No. 2 lode should be considered as an amendment of the Coin No. 2 mill site inasmuch as it was located by Thomas, the owner of the mill site, and was not an adverse location, and that therefore the Coin No. 2 mining claim should share in the common improvements as one of the earlier group of claims. This contention is clearly untenable. Rights to a mill site are initiated by its use for mining and milling purposes, whereas rights to a mining claim are initiated by discovery of mineral. The change of location from one to the other necessarily involves a change not merely of form

but of purpose. The mill site must be located on nonmineral land. By changing the location to a lode claim because it was ascertained that the land therein was mineralized, it was thereby admitted that the mill site was void from its inception, and no mining title can be held to relate back to the inception of a void location. Furthermore, the common improvement work on the mill site could only be applied to the group of mining claims that it tended to benefit. Mill sites are not subject to the annual labor laws and there can be no such thing as the development of a mill site. [Emphasis supplied.]

Id. at 198.

We would point out that Tessie Cooke-Haskins attempted to acquire title to the Lap Wing millsite in 1929 on the implicit theory that the premises were nonmineral in character. In 1962, contestee, himself, represented that both millsites were nonmineral in character by filing a verified statement to that effect, and their validity was reasserted in his answer to the subsequent contest complaint filed by BLM.

We hold that, under the application of judicial estoppel, contestee cannot now be heard to contend that land he represented as nonmineral in character in prior actions, some of which sought the acquisition of title from the United States, was, in fact, during this entire period, mineral in character. The general parameters of the doctrine of judicial estoppel were described by the Tenth Circuit Court of Appeals in In Re Johnson 518 F.2d 246 (1975):

Under the doctrine of judicial estoppel a party and his privies who have knowingly and deliberately assumed a particular position are estopped from assuming an inconsistent position to the prejudice of the adverse party. This

rule ordinarily applies to inconsistent positions assumed in the course of the same judicial proceeding or in subsequent proceedings involving identical parties and questions.

Id. at 252. Considering the expense to which contestee had already put the Government by reason of the assertion of his millsite claims in past proceedings, contestee cannot now be heard to assert that the land is mineral in character. ^{48/} Thus, even were we to find that a discovery of a placer deposit existed in 1929 and continues to exist to this day, we would exclude the lands embraced by the millsite claims from any patent which was to issue.

[10] Even without the invocation of judicial estoppel it is difficult to see how a 30 U.S.C. § 38 mining claim for the land embraced by the millsites could be sustained. The provisions of section 38 require that no "adverse claim" exist. Inasmuch as land cannot simultaneously be both mineral and nonmineral, the millsite claim would, perforce of logic, be adverse to the placer claim. In such a situation, the section 38 placer claim, to the extent of the conflict, must fall. See Ikola v. Goff, 107 Cal. Rptr. 663, 664-65 (Ct. App. 1973).

We will briefly examine two other issues which were raised by the complaint herein: (1) That the Haskins Quarries placer claim does not conform to the rectangular system of public land surveys, and (2) that

^{48/} Contestee did not even attempt to show that the area formerly embraced by the millsite was mineral in character. Thus, Patrick Haskins stated that there had been no removals from the millsites (1977 Tr. 66), while the claimant said there were no mineral values on them (1977 Tr. 445). But see Exh. R-6, "Summary Report," at 7.

\$100 of annual assessment work was not performed for the benefit of the Haskins Quarries placer claim as required by 30 U.S.C. § 28 (1976).

The first issue actually has two parts involved therein. First, is the question whether the various land descriptions provided for the placer claim attain the limits of closure. The second part, while related to the first, is substantially different and concerns the legal and factual question whether the physical configuration of the claim comports with the requirement of the law. The Government's contention relating to the first point was presented by the testimony of Gould relating to the failure of the land description to close within acceptable limits. Judge Morehouse's decision discussed only this question. The Judge noted that the claimant had attempted to describe the claim by metes and bounds and that since BLM had canceled the mineral survey of the placer claim, which claimant had sought, "the technical noncompliance is not of material significance" (Decision at 21).

Insofar as this aspect is concerned, we find ourselves in substantial agreement with Judge Morehouse. While we have no doubt that the descriptions provided by the claimant would be unacceptable as a basis upon which to pass title, ^{49/} we note that such title as would pass would be based on a mineral survey. The question relevant herein is not whether the description is accurate to the extent that descriptive errors are within acceptable limits for a survey, but rather

^{49/} Thus, with respect to mineral surveys, the Manual of Surveying Instructions, 1973, par. 10-17 requires that "all surveys must close within 0.50 ft. in 1,000 ft., and the error must not be such as to make the claim exceed the statutory limit."

whether it is sufficient to reasonably describe the lands embraced by the claim. We hold that, for this purpose, the description is sufficient.

The second facet of this issue, as we have delineated it above, was not examined by Judge Morehouse. While this matter was admittedly not the subject of extensive analysis by the parties, there is sufficient information in the record for us to examine this question under our de novo review authority.

[11] Initially, we note that the Placer Act was amended in 1872 to provide that "all placer-mining claims located after the 10th day of May 1872, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys." 30 U.S.C. § 35 (1976). The critical phrase, of course, is the qualifying "as near as practicable." 50/

As early as the decision in William Rablin, 2 L.D. 764 (1884), the Department recognized that conformity was a question of reasonableness and, therein, expressly recognized that a placer claim along the bed of a river, surrounded by precipitous banks, which stretched 12,000 feet down the riverbed, embracing only a small quantity of surface ground along the shore, was permissible as a location made in

50/ The Placer Act, as originally adopted, 16 Stat. 217, had provided that any placer location "shall conform to the United States surveys." The 1872 Act was designed to permit certain variations where there were acceptable reasons therefore.

exceptional circumstances. This approach was reaffirmed in Pearsall and Freeman, 6 L.D. 227 (1887).

Subsequently, however, a vast array of differing shapes and forms were entered as placer claims and approved for patent. As a result of this increasing practice, irregular swaths were being carved out of the public domain, thereby making management of such lands as were not patented increasingly difficult. As a result of these practices, the question of conformity was reexamined in a series of cases beginning with the Miller Placer Claim, 30 L.D. 225 (1900), and the Wood Placer Mining Co., 32 L.D. 198 (1903), finally culminating in the Snow Flake Fraction Placer, 37 L.D. 250 (1908).

In Snow Flake Fraction Placer, *supra*, the First Assistant Secretary examined the history of Departmental adjudication on this question and established a general rule that:

Whether a placer location conforms sufficiently to the requirements with respect to form and compactness is a question of fact for determination by the land department in the light of the showing made in each particular case, keeping in mind that it is the policy of the government to have all entries, whether of agricultural or mineral lands, as compact and regular in form as reasonably practicable, and that it will not permit or sanction entries or locations which cut the public domain into long narrow strips or grossly irregular and fantastically shaped tracts.

Id. at 250 (syllabus). This constitutes the general rule which has been followed to the present time. See, e.g., Fuller v. Mountain

Sculpture, Inc., 314 P.2d 842 (Utah 1957); United States v. Henrikson, 70 I.D. 212, 217-20 (1963); Fred B. Ortman, 52 L.D. 467 (1928).

The shape of the instant claim is a matter of record. Its bizarre configuration, particularly the area embracing the Lap Wing and Lady Helen millsites, clearly compels the conclusion that this claim does not reasonably comport with the system of public land surveys "to the extent practicable."

We are well aware that various references were made to "gulch" placers. See 1977 Tr. 477, 487, 517. Both the Department and the Courts have long recognized that situations occasionally occur wherein a placer claim is located along a ravine, canyon, or gulch, surrounded by precipitous and, in many cases, impassable canyon walls and cliffs, which themselves contain no mineral values, and that in these situations, unusual modes of location may be necessary. Thus, in William F. Carr, 53 I.D. 431 (1931), the Department held proper a placer location over a mile in length which was located in a narrow gulch. Similar results were reached in Wiesenthal v. Goff, 120 P.2d 248, 252 (Idaho 1941), and Steele v. Preble, 77 P.2d 418, 427-28 (Ore. 1938).

It is impossible, however, to validate the instant claim as some sort of "gulch" placer. The critical factor in validating such locations is the inaccessibility of and lack of mineral values in the confining banks, which, as a practical matter, prevent the claimant

from embracing these areas within the location. Clearly, this concept has no relevance to a situation, as is disclosed herein, where the claim actually does embrace the surrounding banks. Having actually located both the stream bed (which testimony indicated had an areal extent of only 3.67 acres) and the surrounding canyon walls, claimant can hardly contend that the unusual shape which resulted was occasioned by the location of a "gulch" placer.

We also recognize that the rule mandating conformity also excepts claimants in situations where the existence of other prior claims prevent location in compliance with the system of survey. United States v. Henrikson, *supra*; William F. Carr, *supra*; Snow Flake Fraction Placer, *supra*. At one point in the hearing, Davis testified that "since the area is bounded by other patent claims, and you could not take up a legal subdivision because of infringement on someone else, I might look at a part of it as a gulch placer" (1977 Tr. 487). Leaving aside this commingling of two discrete concepts, we merely note that the only land which has been patented that actually abuts the claim is on the western side, and, in fact, embraces land formerly within the original Roger Williams location. Moreover, the relevant question is not what claims, if any, presently exist adjacent to or in the relevant vicinity of the Haskins Quarries placer, but what claims existed during the period from 1923-28 when the claim was purportedly located under 30 U.S.C. § 38 (1976). Contestee presented no evidence on this point, and, as the proponent of the rule that his claim was properly located (*see Foster v. Seaton*, *supra*), the absence of proof of justification impels a

finding that no such justification existed. Finally, under the doctrine enunciated in Cole v. Ralph, *supra*, there is no warrant for holding that the nature of a claim established pursuant to the provisions of 30 U.S.C. § 38 (1976), alleviates the requirement that claimants make placer entries in conformance to the system of survey "to the extent practicable."

It does not necessarily follow that failure to comply with the conformity requirement works to invalidate the claim. Rather, invocation of the rule has normally resulted in requiring a claimant to amend the claim so that it does conform as nearly as practicable with the rectangular system of survey. Thus, in many cases, as in Fred B. Ortman, *supra*, failure to conform was held a curable defect which "in the absence of adverse claim to the added land" could be cured by either amendment or relocation. 53 L.D. at 471. *See also* United States v. Henrikson, *supra*; Hogan and Idaho Placer Mining Claims, 34 L.D. 42 (1905).

However, in those situations in which conformance was either judged to be impossible by the very nature of the original shape, as in Miller Placer Claim, *supra*, and Wood Placer Mining Co., *supra*, the entry was canceled. In the instant case, addition of new land either through amendment or relocation is not possible since the Watershed Withdrawal constitutes an adverse claim which prevents the acquisition of any rights to land not already appropriated. *See generally* R. Gail Tibbetts, 43 IBLA 210, 217-20, 86 I.D. 538, 542-43 (1979). Moreover,

inasmuch as we have held, supra, that the evidence was sufficient to establish only three individuals as colocators, it would not be legally possible to add any land to this claim. Thus, the corrections that would be required could only be accomplished by the deletion of land.

We will not attempt, at this time, to delineate a configuration of the claim which would comport with the requirements of 30 U.S.C. § 35 (1976). If the other grounds relied upon in our decision are invalidated upon review, claimant should be accorded the initial opportunity to attempt to describe his claim in conformity to the system of survey. We can, however, see no way in which the area formerly embraced by the millsites could be conformed and, accordingly, we hereby reject the patent application to the extent that it includes this area for this additional reason.

[12] The second issue which we wish to briefly address relates to the performance of assessment work for the benefit of the Haskins Quarries placer claim. Judge Morehouse in his decision noted that proofs of labor had been filed every year since 1921 and that the Government had made no effort to pursue this allegation in its brief, and then found "there has been substantial compliance with the provisions of 30 U.S.C. § 28" (Decision at 22).

On this point, we think that Judge Morehouse misinterpreted the thrust of the Government complaint. The crucial import of Medina's testimony was not the fact that he was unable to find recorded proofs

of assessment for various years. See Exh. G-7. Indeed, Medina readily admitted on cross-examination that it was possible that the county records were inaccurate with respect to those years in which no assessment work had been recorded. Rather, the point which the Government was attempting to make was that these assessment proofs related only to the lode claims. The Government was, in effect, arguing that, since the claimant and his predecessors had not performed assessment work for the placer claim, that claim could not be validated.

We wish to make a few general observations on this point. In our recent decision in United States v. Bohme, supra, we reviewed, at considerable length, the historical development in the law concerning the performance of assessment work, which culminated in the Supreme Court decision in Hickel v. The Oil Shale Corp. (TOSCO), 400 U.S. 48 (1970). It is sufficient, for the purposes of this decision, merely to note that the Supreme Court held that failure to substantially comply with the requirements of 30 U.S.C § 28 (1976) might, in certain circumstances, result in a forfeiture of those claims to the United States. It is our view that included within the ambit of this rule are those claims which are located on land now withdrawn from mineral entry and for which there has not been substantial compliance with the assessment work requirements. 51/ Cf. Andrew L. Freese, 50 IBLA 26, 36, 87 I.D. 395, 399 (1980).

51/ While the TOSCO case dealt with the question of maintenance of claims for minerals which were no longer locatable, due to the passage of the Mineral Leasing Act, the rationale is, we think, equally applicable to claims located on lands which are withdrawn from the initiation of new mineral rights.

The placer claim asserted herein is, by its nature, a separate and distinct entity from the lode claims and millsites which formerly embraced the subject lands. As such, the mere fact that assessment work was performed for the benefit of the lode claims does not, ipso facto, establish that assessment work was performed for the benefit of the placer claim. Indeed, some of the work involved herein, in particular the work relating to the construction of tunnels and adits to develop the lode claims for gold and vanadium, which expenditures were submitted in support of the original patent application in 1929, could not be seen as benefiting a placer location for building stone, which claimant alleges was then in existence.

At the same time, however, while the recording of proofs of assessment work might provide some indication that the assessment work was actually accomplished, recordation neither established that the work was, in fact, accomplished (California Dolomite Co. v. Standridge, *supra*), nor did the failure to record locally establish conclusively that the work was not done (United States v. Bohme, *supra*).

The record on this point is less than clear. Work done in road construction and maintenance could clearly redound to the benefit of both the lodes and the asserted placer. While the question is not free of all doubt, we believe that Exhibit G-7, which showed that no assessment work had been recorded for the placer claim, established a prima facie case that the work had not been performed. The burden then devolved to the claimant to show that despite the absence of recorded

statements, the requisite work for the benefit of the placer claim had been accomplished. This, we hold, the claimant has not done. Therefore, we hold that even were we to find that a discovery of a placer deposit had existed prior to the Watershed Withdrawal Act, the failure of the claimant to substantially comply with the requirements of 30 U.S.C. § 28 (1976) resulted in an effective forfeiture of the claim to the United States.

[13] Finally, we wish to address various concerns which were expressed by attorneys for both the Department of Justice (during the Federal Court litigation) and the Department of Agriculture concerning what was perceived as a likely result emanating from the District and Circuit Court approach in this case, viz., a practical requirement that every contest brought against either a lode or a placer claim would, for safety's sake, have to include a charge of invalidity directed to the possibility of the existence of a 30 U.S.C. § 38 claim in the form of a placer or lode, mutatis mutandis, or run the risk, at some indefinite future date, of being required to bring such an allegation to contest and hearing again.

Much of this concern was, we feel, generated by the essential difference between the factual milieu of the instant case and that which attended the decision in Springer v. Southern Pacific Co., 248 P. 819 (Utah 1926), the only major precedent for the argument that a claimant could locate a 30 U.S.C. § 38 (1976) placer claim adverse to his own lodes. In that case, the Supreme Court of Utah found that

Southern Pacific (the defendant) and its predecessors in interest had been in possession of lode claims adjacent to its track for over 20 years, and had expended upwards, if not in excess of \$500,000 for their development. These claims, however, while located as lodes, were located for building stone which could only properly have been taken up by placer location. Plaintiffs, as the Court noted, "early in the morning of said day, long before working hours and either before or about daylight, clandestinely and surreptitiously entered upon and invaded the actual possession of said claims" of the defendant. *Id.* at 821. The Court found, in fact, that this subsequent location was not made in good faith but was rather made "for the sole purpose of dispossessing the respondent and to compel it to pay tribute to appellants." *Id.* at 825. Thus, considering the manifest equities, it was not surprising that in a suit between the two locators the Court held that the railroad should prevail, on a theory that it was possessed of a subsisting placer claim under 30 U.S.C. § 38, embracing the area covered by its lodes. 52/

This factual construct has been juxtaposed unfavorably with the instant case. Thus, it has been pointed out that the Department did

52/ Indeed, to the extent the Court vitiated the location of the plaintiffs as invalid ("what one may not do by force he likewise may not accomplish surreptitiously or by stealth" 248 P. at 824), the Court was more properly invoking the doctrine of *pedis possessio* and not the adverse possession rationale implicit in 30 U.S.C. § 38 (1976). Though *pedis possessio* applies to pre-discovery locations, since the claims were in lode form and the deposit in placer, there was no lode discovery. Thus, paradoxically, *pedis possessio* was factually applicable.

not invalidate contestee's claims in the 1965 proceedings because they were in an improper form. Rather, considering most of the very sales presented herein, the Hearing Examiner had found the claims invalid because such marketable mineral as may once have existed had long since been depleted. Therefore, it has been argued that there was no justification for giving the claimant two bites out of the apple.

We, however, feel that both the District and Circuit Courts, mindful of the procedural difficulties which prevented the claimant from obtaining any substantive review of the 1965 determination of invalidity, and possibly misled by certain assertions on appeal, intended no such radical approach to public land law adjudication.

In any event, the adoption of section 314 of FLPMA, 43 U.S.C. § 1744 (1976), should allay such fears as have been expressed. The recordation provisions of FLPMA required the recording of all claims located prior to October 21, 1976, no matter how located, on or before October 22, 1979, or the claims would be deemed conclusively to be abandoned and void. See 43 U.S.C. § 1744(c) (1976). Specific provision was made for recording claims premised or dependent upon 30 U.S.C. § 38 (1976). See 43 CFR 3833.0-5(i); Marvin E. Brown, 52 IBLA 44 (1981).

Since FLPMA also required the recording of new claims within 90 days of their location, it is difficult to see how any new claims

can arise, for which recourse to 30 U.S.C. § 38 (1976) to establish the existence of the claim is necessary or possible. Rights of individual ownership of the claim may still be determined by 30 U.S.C. § 38 (1976), but if that claim has not been duly recorded under FLPMA, it can only be treated as a nullity. Thus, the possible problems foreseen by some will not occur.

In summary, we hold that the evidence establishes that there was not disclosed within the limits of the claim, during the critical period, a placer deposit of minerals of such quantity or quality as to constitute a discovery under the mining laws. In addition, we expressly find that the land was not chiefly valuable for building stone during this same period. We also find that appellant is estopped, under principles of judicial estoppel and the terms of 30 U.S.C. § 38 (1976), from asserting that the lands formerly embraced by the Lap Wing and Lady Helen millsites are now, and were at the critical time, mineral in character.

Insofar as the specific allegations of paragraph 5.C. of the complaint are concerned we find that the claim does not conform to the rectangular system of survey "to the extent practicable" (5.C.1); that the claim embraces more than 20 acres for each individual claimant (5.C.2); and that the \$100 worth of labor and improvements required by 30 U.S.C. § 28 (1976) were not performed for the benefit of the Haskins Quarries placer mining claim as required by law (5.C.5).

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 reversed, and the Haskins Quarries placer claim is declared null and void.

James L. Burski
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Bruce R. Harris
Administrative Judge