

UNITED STATES  
v.  
LEROY S. JOHNSON ET AL.

IBLA 85-190

Decided December 31, 1987

Appeal from a decision of Administrative Law Judge Robert W. Mesch, declaring the Grey Mound #2 mining claim invalid. Utah 10746.

Affirmed.

1. Mining Claims: Possessory Right

Under the provisions of 30 U.S.C. § 38 (1982), 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. "Holding and working" a claim requires more than the mere performance of assessment work, and is only established where claimants have maintained actual, open, and exclusive possession of the claim for the term of the local statute of limitations for adverse possession of real estate. Evidence of exploitation of the mineral deposit by parties other than the claimants without permission from or compensation to the claimants will preclude such a finding.

2. Mining Claims: Location--Mining Claims: Relocation--Mining Claims: Withdrawn Land

An amended location notice generally relates back to the date of the original location notice. A location notice cannot be considered an amended location, so as to relate back to a location which predates a withdrawal, to the extent such location notice describes new land not embraced in the original location.

3. Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Determination of Validity--Mining Claims: Discovery: Marketability--Surface Resources Act: Generally

Sec. 3 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 611 (1982), declared that common varieties

of building stone, sand and gravel, cinders, and certain other materials are not valuable mineral deposits under the mining laws. In order for a claim for such material to be sustained as validated by a discovery, the prudent man/marketability test of discovery of a valuable mineral deposit must have been met at the date of the Act, and reasonably continuously thereafter up to and including the time of a contest hearing.

4. Mining Claims: Determination of Validity--Mining Claims: Discovery: Marketability

The lack of evidence of prior sales of cinders from a claim is not conclusive on the issue of marketability. However, where the evidence shows that exploitation of cinders from the claim and the market for such cinders, with the exception of use by the state highway authority without compensation to claimants, was extremely limited at the time of the withdrawal of common varieties of cinders in 1955, a conclusion after a hearing that there was no market for the cinders which would justify a person of reasonable prudence in expending his time and money to develop a paying mine will be affirmed.

APPEARANCES: Bradford C. Nielson, Esq., Salt Lake City, Utah, for appellants; David K. Grayson, Esq., Assistant Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for appellee.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This appeal is taken from a decision dated November 2, 1984, by Administrative Law Judge Robert W. Mesch, declaring invalid the Grey Mound #2 mining claim embracing lots 4, 5, 8, and 9, sec. 6, T. 43 S., R. 11 W., and the E 1/2 SE 1/4 NE 1/4 and the NE 1/4 NE 1/4 SE 1/4 of sec. 1, T. 43 S., R. 12 W., Salt Lake Meridian. As the background of this appeal involves three administrative hearings over a span of 24 years (in 1961, 1976, and 1984), an explanation of this history will facilitate understanding of the issues involved. The records of the hearings are identified herein as I, II, and III respectively, followed by a reference to a transcript page number or exhibit number.

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Procedural History

On March 30, 1955, four association placer mining claims known as Grey Mound #1, Grey Mound #2, Grey Mound #3, and Grey Mound #4 were recorded in Washington County, Utah. Each claim was located by an association of eight locators. The names of the claims and the locators of each claim are set forth in Appendix A attached hereto. The date of location for each of the above claims shown on the notice of location was March 2, 1955.

Each claim description made reference to the center of sec. 6 and apparently was intended to cover a quarter section, e.g. the Grey Mound #1 claim covered the NW 1/4 of sec. 6, and the Grey Mound #2 claim covered the SW 1/4 of sec. 6. <sup>1/</sup> As noted by Judge Mesch, the claims were located "in order to lay claim to a deposit of cinders in a cinder cone known as Little Creek Knoll" (Decision at 3).

At the time the claims were located and prior to 1971 (when pit 3 was opened in lot 9) there were only two pits from which significant amounts of cinders had been removed from the cone--pits 1 and 2 (II Tr. 95, 201, 212, and 231). Pits 1 and 2 are located in lots 4 and 5, respectively, of sec. 6 (II Tr. 35-36, Exh. 5). Pits 1 and 2 are also located within the boundaries of the Grey Mound #1 as identified from the 1955 location notice (II Tr. 36).

Accordingly, in 1961 the United States filed a contest, designated Utah 9278, challenging the validity of the Grey Mound #1 claim. On September 12, 1961, while the contest was pending, lots 4 and 5 of sec. 6 were withdrawn from mining location by the issuance of a material site right-of-way (U-060729) to the State of Utah. See Ralph Memmott, 61 IBLA 116 (1982); Sam D. Rawson, 61 I.D. 255 (1953). At the contest hearing, the parties recognized that the contested claim should be considered as covering the entire NW 1/4 of sec. 6, including particularly lots 4 and 5 (I Tr. 10-12; I Exh. 1).

Hearing Examiner Howard B. Black, by decision of January 15, 1962, concluded that the Grey Mound #1 claim lacked a discovery of valuable minerals and declared the claim null and void. The hearing examiner's conclusion was based on a finding that the claimant had not rebutted the Government's prima facie case that the cinders were a common variety and that there was not a sufficient market for the cinders as of July 23, 1955 (when common varieties of cinders were made nonlocatable), to justify a prudent man in developing a mine. An attempt to obtain administrative review of the decision within the Department was unsuccessful due to a failure to comply with certain procedural requirements. No judicial review of the decision was obtained at the time.

On February 17, 1972, seven of the original locators of the Grey Mound #2 claim with one additional locator recorded a Certificate of Location [and] Amended Notice of Location of a claim also denominated Grey Mound #2 (II Exh. 11). Amended Grey Mound #2 included lots 4, 5, 8, and 9 of sec. 6, T. 43 S., R. 11 W., and the E 1/2 SE 1/4 NE 1/4 and the NE 1/4 NE 1/4 SE 1/4 of adjoining sec. 1, T. 43 S., R. 12 W. More particularly, as stated in Judge Mesch's decision, the 1972 Certificate of Location [and] Amended Notice of Location in effect asserted:

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<sup>1/</sup> Sec. 6 is an irregular section embracing substantially more than the normal acreage in the western half of the section which has been subdivided into lots. In addition to the 160 acres which would normally constitute the NW 1/4 of the section (lots 1, 2, 5, and 6), the NW 1/4 embraces two extra lots (lots 3 and 4) embracing 23.76 and 23.74 acres, respectively, on the western edge of the section (I Tr. 10-11).

(1) that the Grey Mound #2 claim had actually been located on April 19, 1945, and not on March 2, 1955, as stated in the original notice of location;

(2) that the Grey Mound #2 claim actually covered a portion of the land in the NW 1/4 of section 6, i.e., lots 4 and 5, 30 acres of land in the adjoining section 1, and a portion of the land in the SW 1/4 of section 6, i.e., lots 8 and 9, and the claim was not confined to the SW 1/4 of section 6, as stated in the original notice of location;

(3) that pit No. 1 and pit No. 2 in the NW 1/4 of section 6, which had been the subject of the litigation involving the Grey Mound #1 claim, were actually included within the Grey Mound #2 claim.

(Decision at 4). The locators certified that the document was an amended location notice of the Grey Mound #2 claim made to correct errors in the location notice which was placed on the ground on March 2, 1955, with the intent of reflecting that the date of location was approximately April 19, 1945, and that the original location notice should have been dated approximately April 19, 1945.

On May 16, 1972, the locators filed an application for patent (U-18932) of the Grey Mound #2 claim, as amended. Claimants asserted entitlement to the land described in the 1972 location and amendments document pursuant to the provisions of 30 U.S.C. § 38 (1982) (see II Exh. B).

The case came before the Board previously as an appeal from the decision of the Utah State Office, Bureau of Land Management (BLM), dated October 25, 1972, rejecting the application for patent of amended Grey Mound #2 claim. On June 6, 1973, the Board ordered a contest to resolve issues of discovery, title, and the effects of the 1961 material site right-of-way. Thereafter, on July 1, 1976, BLM issued a contest complaint against the Grey Mound #2 claim, located March 2, 1955, and the amended Grey Mound #2 claim, recorded February 17, 1972. The contestees answered the complaint and the matter was heard before Administrative Law Judge John R. Rampton in November and December 1976. An appeal from Judge Rampton's decision culminated in the Board's decision of February 28, 1979, styled United States v. Johnson, 39 IBLA 337 (1979).

In that decision, the Board determined, that as to the area embraced by the original Grey Mound #1 claim including lots 4 and 5 of sec. 6 embracing pits 1 and 2, relitigation of the discovery issue was barred by the 1961 proceeding in which the hearing examiner had found that the Grey Mound #1 claim lacked discovery. United States v. Johnson, supra at 344-45. As to lots 8 and 9 of sec. 6 and the lands described in sec. 1, the Board examined the evidence and concluded that there had been no discovery prior to July 23, 1955.

The claimants sought judicial review of the Board's decision. By order, as modified, the United States District Court affirmed in part and

reversed in part the Board's decision and remanded the case for further proceedings. Johnson v. United States, No. C-79-0486 (D. Utah, Jan. 18, 1983). The court reversed the Board's determination that the 1962 decision of the hearing examiner was res judicata regarding the lack of discovery on lots 4 and 5, and further directed that the Department make a de novo determination as to whether there was a valid discovery on the claim prior to July 23, 1955. The court affirmed the Board's finding on the lack of discovery within lots 8 and 9. The court further directed the Department on remand to determine whether the claimants had established possessory title under 30 U.S.C. § 38 (1982) to the Grey Mound #2 claim as amended.

On August 24, 1983, the Board referred the matter for a hearing which was duly held before Judge Mesch on March 6 and 7, 1984, in St. George, Utah.

#### Review of Judge Mesch's Decision

In his November 2, 1984, decision Judge Mesch provided a detailed history of the proceeding and posed certain issues to be determined. Appellants dispute his determinations on four of these issues. We will discuss each of the four in turn within the context of the Judge's rationale.

The Judge formulated the first issue as follows: "Whether the mining claimants hold possessory title under 30 U.S.C. sec. 38 to land covered by the Grey Mound #2 claim, as described in the 1972 certificate of location, \* \* \* which was allegedly located on April 19, 1945?" (Decision at 7). 2/ After an extensive analysis of the evidence and governing authorities, the Judge answered this issue in the negative.

The relevant statute, 30 U.S.C. § 38 (1982), 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 \* \* \*.

The Judge construed the statute as follows:

At the outset, it is important to note that this section of the mining laws, by its express terms, deals with mining claims that have been held and worked for the period prescribed by the adverse possession statute of a state. It covers mining claims that were in existence, with the land being claimed under the mining laws,

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2/ In order to determine appellants' rights to the land described in the 1972 notice of location, the Administrative Law Judge distinguished between the Grey Mound #2 claim purportedly located on Apr. 19, 1945, and the Grey Mound #2 claim located on Mar. 2, 1955, and amended by the 1972 location notice.

prior to the time of seeking the benefits of the section. It does not cover land that was not previously claimed under the mining laws or land that was first included in a mining claim at or about the time of seeking the benefits of the section. In other words, there must be a pre-existing mining claim that was actually held and worked.

(Decision at 17-18). The Judge ruled that under 30 U.S.C. § 38 (1982) mining claimants must prove that they have held and worked their claims for the period prescribed by the adverse possession statute (7 years in Utah) and that when satisfactory evidence of possession and working is presented, it will be deemed that the claimants did, in fact, locate their claims and have good possessory title over all others (Decision at 21). He also held that the claimants had the burden of showing "actual, open, and exclusive" possession of the land being worked as a mining claim.

Considering the question of possessory title as of March 2, 1955, when the location notices for the Grey Mound claims were actually posted and recorded, <sup>3/</sup> the Judge reasoned that 30 U.S.C. § 38 (1982) "could not be used as a means of back dating the location of a mining claim; or as a means of providing retroactive recognition to a mining claim that did not previously exist \* \* \*" (Decision at 19). He then discussed United States v. Haskins, 505 F.2d 246 (9th Cir. 1974), where the court stated that the purpose of 30 U.S.C. § 38 (1982) "is to obviate the necessity of proving formal compliance with requirements for locating a claim but not to dispense with proof of discovery." Id. at 250. In Haskins, the claimants had been in possession of lode mining claims and millsites located between 1894 and 1909. In 1928, the land embraced by the claims was withdrawn from entry under the mining laws. After a Government contest, the claims were declared null and void in 1965. In 1968 Haskins filed an application for patent to the lands embraced by the lode claims, asserting that he had a valid placer claim under 30 U.S.C. § 38 (1982). The court held:

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.

505 F.2d at 250. The Judge analyzed Haskins as follows:

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<sup>3/</sup> Judge Mesch noted that if appellants did not hold possessory title prior to that time they could not establish possessory title prior to withdrawal of common varieties of cinders from location under the mining laws by the Act of July 23, 1955. The period of adverse possession must occur while the land is open to acquisition under the mining law. Ernest Higbee, 60 IBLA 267, 275 (1981).

In the Haskins case, an earlier mining claim had actually been located and rights had been asserted under the mining laws to the land in question by virtue of the earlier mining claim. The Court simply permitted the Haskins family to convert, in 1968, lode claims, that had been located over 50 years earlier, to a placer claim. In permitting the holding and working of the lode claims to be credited to the placer claim, the Court at least brought the Haskins within a strained construction of the basic requirement of 30 U.S.C. § 38 that the mining claimants must 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". Simply stated, the Haskins did have pre-existing mining claims that had actually been located; and they had held and worked those claims under the mining laws. The Haskins decision does not in any way affect the basic requirement of 30 U.S.C. § 38 that there must be a mining claim that was worked for the prescribed period of time.

The Judge then formulated the following questions to be answered in resolving the first issue.

1. Did the eight mining claimants, or their grantors, actually locate a mining claim on April 19, 1945, covering the land described in the 1972 location document -- as they specifically allege in the 1972 document (II Ex. No. 11) and in their patent application (II Ex. No. B) -- or did they actually locate any such claim prior to the location of the four Grey Mound claims on March 2, 1955?

2. Did the eight mining claimants, or their grantors, actually assert any rights under the mining laws to the land described in the 1972 document prior to the location of the four Grey Mound claims on March 2, 1955?

3. Did the eight mining claimants, or their grantors, hold and work the mining claim that was allegedly located on April 19, 1945, covering the land described in the 1972 document, prior to the location of the four Grey Mound claims on March 2, 1955?

4. Did the eight mining claimants, or their grantors, exercise actual, open, and exclusive possession of the land described in the 1972 document for mining purposes prior to the location of the four Grey Mound claims on March 2, 1955?

(Decision at 20-21).

From the evidence the Judge found that in the 1920's and 1930's, the Barlow, Johnson, and Jessop families moved into an area known as Short Creek along the Utah-Arizona border (II Tr. 497-98). As the community expanded, the Arizona portion became known as Colorado City and the Utah portion as

Hildale. The two towns operate as one community and are simply separated by the State line.

On or about April 19, 1945, members of the community, some of whom do not appear as locators on the 1955 location notices or the 1972 location and amendment document, <sup>4/</sup> opened a pit (Pit No. 1) on the west side of a cinder cone, known as Little Creek Knoll, in lot 4, NW 1/4 of sec. 6 (II Tr. 201). From April 1945 to February 1951, when Pit No. 2 was opened and Pit No. 1 abandoned, an estimated 200 to 300 cubic yards of cinder were removed from Pit No. 1 (II Tr. 39, 175).

Judge Mesch found the following facts were established at the hearings regarding appellants' possessory right to the Grey Mound #2 claim as described in the 1972 Certificate of Location:

Dan C. Jessop, who appears on the 1955 location notices and the 1972 location and amendment document, testified as follows concerning the use of pit No. 1:

Q. Anyone that came along from the community or anywhere else [could] use the pit?

A. As far as I know.

Q. It was a common use area for everybody to use?

A. Yes. (II Tr. 221).

In the late 1940's Mojave County, Arizona removed cinders from pit No. 1 and used the cinders in road work. (I Tr. 91). There is nothing to indicate that the county had to obtain permission from anyone to go upon the property to extract cinders. It is clear that the county did not pay anyone for the cinders. (I Tr. 59, 67, 95; II Tr. 320, 357, 443, 580).

In February of 1951, a maintenance supervisor with the Utah State Highway Department worked out an arrangement with Carl Holm, a member of the community of Colorado City-Hildale, to take a bulldozer and run about two miles of road to what was to become pit No. 2. (II Tr. 92, 95). Carl Holm does not appear as a locator on the 1955 location notices or the 1972 location and amendment document. There is nothing to indicate that Carl Holm was acting in any way as an agent for the locators listed on the 1972 certificate of location or for anyone who had purportedly located

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<sup>4/</sup> Dan Jessop in his testimony identified the people involved that he could remember as including Fred Jessop, Virgil Jessop, Melvin Johnson, Leroy Johnson, Richard S. Jessop, and Joseph S. Jessop, Sr., in addition to himself (II Tr. 201).

a mining claim at that time. In return for helping with the road, the maintenance supervisor agreed to load cinders for people from the community while the State was hauling cinders from pit No. 2. (II Tr. 92, 95, 205, 377). Dan C. Jessop, who appears on the 1955 location notices and the 1972 location and amendment document, and who operated the bulldozer at the time, testified that they worked on the road "[t]o obtain cinders for our community use". (II Tr. 205).

Pit No. 2 was opened on the east side of Little Creek Knoll using State owned equipment. (I Tr. 50; II Tr. 93, 100). The pit is in lot 5 in the NW 1/4 of section 6. (II Exh. Nos. 5, 6). The State removed about 3,000 yards of cinders from pit No. 2 over a short period of time during the winter of 1951 and used the material to work into deep ruts in an old dirt State road in order to get a bottom that would hold vehicles in winter weather. (I Tr. 28, 48, 49; II Tr. 93-95, 377). The State maintenance supervisor does not believe there was any permission given by anyone to go upon the property to extract cinders, and the State made no payment to anyone for the cinders. (II Tr. 101, 102, 377). While working in the pit, the State employees loaded cinders on small trucks for anyone from the community that showed up and wanted cinders. (II Tr. 96).

In addition to the use of cinders by the State of Utah, Mojave County, Arizona, "used quite a few of these cinders in different stretches" of county roads in the early 1950's. (I Tr. 91). Again, there is no evidence that the county had to obtain permission from anyone to go upon the property to obtain cinders, and it is clear that the county did not pay anyone for the cinders. (I Tr. 59, 67, 95; II Tr. 320, 357, 443, 580).

Dan C. Jessop, who appears as a locator on the 1955 location notices and the 1972 location and amendment document, provided the following information relating to (1) the use of the bulldozer to construct the road to pit No. 2 in 1951 for the Utah State Highway Department; (2) the use of cinders from pit No. 2 by the community of Colorado City-Hildale; and (3) the make-up or organization of the community of Colorado City-Hildale:

Q. Okay. And what did you commence to do for a living when you terminated from the Service [after World War II]?

A. Well, within a very short time I went to work with Mr. Holms operating his equipment, his crawler tractor and we done farming work and dozer work and we done a lot of custom work in the general area, all of southern Utah and Arizona strip country.

Q. Now, Mr. Humphrey [the Utah State Highway Department supervisor] I believe testified that Mr. Holms helped with these roads out at Grey Mount [sic]?

A. Yes, Mr. Holms was the man whose name the bulldozer was purchased in and he somewhat managed the work and I worked with him and I operated the machinery.

\* \* \* \* \*

A. We worked on that road off and on from then on. We hauled cinders out of there whenever we --

Q. -- When you say we who do you refer to?

A. When I say we I refer to the people of our community, Colorado City, Short Creek it was called at that time, \* \* \* (II Tr. 206, 207).

\* \* \* \* \*

Q. Who owned that piece of equipment [the bulldozer]?

A. The community owned it.

\* \* \* \* \*

Q. And how many people then owned a share of this piece of equipment?

A. How many people there were in the community.

Q. How many people were there in the community?

A. Well, I think the former testimony was in reference to the population at the time.

Q. At the time in the year '49 to '51 how many people owned an interest in this piece of equipment[?]

A. Several hundred

\* \* \* \* \*

Q. All right. Then it is your testimony that you were using the community equipment for the community in the open[ing of] pit number two, is that correct?

A. Yes.

Q. And the community at that time consisted of four hundred people or more or less?

A. Yes. (II Tr. 223, 224).

Joseph I. Barlow, who appears as a locator on the 1955 location notices and the 1972 location and amendment document, testified as follows concerning the use of cinders during the early 1950's by the community of Colorado City-Hildale:

\* \* \* Mr. [Carl] Holms [who was a member of the community, but who does not appear as a locator on the 1955 location notices or the 1972 location and amendment document] and I would make the trucks available and then for maybe a week's time we would just haul like crazy and stockpile cinders around town, on the roads or by the homes that were being built or whatever.

Q. Did you go out every month would you say?

A. No, it wasn't a regular, it wasn't a regular run as such. It was just when they were needed. (II Tr. 407).

Fred M. Jessop, who appears as a locator on the 1955 location notices and the 1972 location and amendment document, provided the following additional information on the question of actual, open, and exclusive possession:

Q. How about the ranchers around that area, did they haul cinders that you know of?

A. Not that I know of. The road was open. They could have done it. I don't know. (II Tr. 390).

(Decision at 23-26). We adopt the Administrative Law Judge's statement of the facts as supported by the record.

In 1954, Louis Jessop Barlow, who supervised the location of the four claims in 1955, was informed that building materials might no longer be locatable after the middle of 1955 because of what was to become the Common Varieties Act of July 23, 1955 (30 U.S.C. § 611 (1982)). Barlow testified at the second hearing:

I just was informed that building materials which we had used in our own area for many years would not be locatable after the middle of 1955 and this became an urgency in my mind and \* \* \*

we decided to go ahead and frame up the cinder knoll which we had been using without an actual claim on it, and filing a claim.

(II Tr. 297). Barlow had given similar evidence at the 1961 hearing indicating he had no knowledge of the location of any claim covering this ground prior to 1955 (I Tr. 95-96). Judge Mesch found this testimony to be clear and convincing evidence that no mining claim had been located covering the cinder deposit prior to the location of the four Grey Mound claims on March 2, 1955, and that no mining claim was in existence prior to that date which could have been "held and worked" under 30 U.S.C. § 38 (1982) (Decision at 27-28). Judge Mesch further found that no affidavits of annual assessment work with respect to any of the claims had been filed in the period between April 19, 1945, and March 2, 1955 (Decision at 29). This fact is borne out by the record (II Tr. 120; II Exh. 10). The Judge couched his ultimate conclusions on the first issue as follows:

I find that the mining claimants did not hold possessory title pursuant to 30 U.S.C. § 38 to the land covered by the Grey Mound #2 claim, as described in the 1972 certificate of location, at the time the four Grey Mound claims were located on March 2, 1955, or at the time the patent application was filed on May 13, 1972; and that they do not hold possessory title under 30 U.S.C. § 38 to the land in question at the present time because:

(1) they did not locate any mining claim or assert any rights under the mining laws to the land in question prior to the location of the four Grey Mound claims on March 2, 1955;

(2) they did not hold and work a mining claim covering the lands in question, as required by 30 U.S.C. § 38, because there was no mining claim in existence that could have been held and worked;

(3) They did not exercise actual, open, and exclusive possession of the land in question under the mining laws, or any other law, prior to the location of the four Grey Mound claims on March 2, 1955 \* \* \*.

(Decision at 39).

Appellants assert that the Judge ignored the purpose of 30 U.S.C. § 38 (1982). Next, they argue that the requirements of open and exclusive possession operate only as against adverse claimants, not permissive users of the resource. Finally, they charge that the Judge ignored "abundant evidence" to the effect that permission was required of the locators when members of the community wished to obtain cinders.

[1] Under 30 U.S.C. § 38 (1982), 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 proof, of acts of location, recording, and transfer. Ernest Higbee (On Reconsideration), 79 IBLA 380 (1984). In Cole v. Ralph, 252 U.S. 286 (1920), the Supreme 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." 252 U.S. at 305. The Court, noting that 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.

Quoting from Barklage v. Russell, 29 L.D. 401 (1900), the Court further noted that 30 U.S.C. § 38 (1982) was not intended to be a separate and independent provision for patenting a mining claim but must be construed in pari materia with the whole body of mining law. Cole v. Ralph, supra at 306.

The operative statutory phrase in 30 U.S.C. § 38 (1982), is "held and worked." This Board has previously noted that:

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 and worked his claim in addition to such other showings as were required by law. [Emphasis in original.]

United States v. Haskins, 59 IBLA 1, 52, 88 I.D. 925, 951 (1981) aff'd Haskins v. Clark, CV-82-2112-CBM (C.D. Cal., Oct. 30, 1984). The performance of annual assessment work has been held to establish compliance with the requirement that the claim be worked. United States v. Haskins, supra at 52-53, 88 I.D. at 951. The failure to record proof of assessment work (as opposed to failure to perform assessment work) is not fatal to a possessory claim under 30 U.S.C. § 38. Id. at 54 n.37, 88 I.D. at 952 n.37. However, we concur with the finding of Judge Mesch that the absence of recorded proof of labor prior to 1955, coupled with the filing of proof of labor subsequent to location of the claims in 1955, is probative of whether the land was embraced in a claim prior to 1955.

Moreover, the requirement that a claim be held and worked has been found to require possession by claimant going beyond mere performance of assessment work. Thus, a right to patent under 30 U.S.C. § 38 (1982) has been held to require holding possession and working a claim while keeping others out. Belk v. Meagher, 104 U.S. 279, 287 (1881). Similarly, a peaceable adverse entry was held to operate as an ouster. Id. Maintenance of

actual, open, and exclusive possession of the claim by the claimant coupled with development has been recognized as required to establish possessory title. Oliver v. Burg, 58 P.2d 245, 249 (Ore. 1936); Springer v. Southern Pacific Co., 248 P. 819 (Utah 1926). In Humphrey v. Idaho Gold Mines Development Co., 120 P. 823, 827 (Idaho 1912), the court held 30 U.S.C. § 38 (1982) had the effect of eliminating the necessity for proof of posting and recording a notice of location where the claimant of mineral ground has been in actual, open, and exclusive possession of the ground for the period required by the statute of limitations for adverse possession of real estate. The court held, however, that marking the boundaries of the claim so as to afford actual notice of the extent and boundaries of the claim, coupled with actual possession and exclusion of all adverse claimants, is required. Id.

Applying these standards to the evidence in this case, it is clear the record supports Judge Mesch's finding that appellants did not locate a mining claim or assert any rights under the mining laws to the subject lands prior to location of the four Grey Mound claims on March 2, 1955. The testimony established that not all of the people opening the original pit (Pit No. 1) on the claim were shown on the 1955 or 1972 location notices, although some of their names appeared thereon. Substantial quantities of cinders were removed for road improvement purposes by Mohave County, Arizona, and the Utah Highway Department without permission from or compensation to the purported locators. <sup>5/</sup> Substantial development (road) work was accomplished by Carl Holms. He was not acting as an agent of the locators. The record indicates that in return for assistance with opening the road, the maintenance supervisor for the State Highway Department agreed to load cinders for people from the community. Thus, the evidence supports Judge Mesch's finding that claimants did not hold and work an mining claim as required to establish possessory title to a mining claim under 30 U.S.C. § 38 (1982) because there was no mining claim prior to March 2, 1955, and because claimants did not maintain actual, open, and exclusive possession prior to location of the claims on March 2, 1955. Accordingly, we must affirm the finding of the Administrative Law Judge.

Having determined the first issue in the negative, Judge Mesch posed the second as follows:

[W]hether the mining claimants have any recognizable rights to (i) the land included within the 1955 Grey Mound #2 claim which was not excluded by the 1972 amended notice of location, and (ii) the new land added to the 1955 Grey Mound #2 claim by the 1972 amended notice of location?

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<sup>5/</sup> Certain materials useful for fill, grade, ballast, or base have never been regarded as locatable even in situations where they may be sold at a profit. United States v. Bienick, 14 IBLA 290, 298 (1974) (Steubing, A.J., concurring). However, such substances are subject to disposition under the Materials Act of 1947, as amended, 30 U.S.C. §§ 601-604 (1982). Disposal of cinders to a state agency or subdivision is authorized without charge. 30 U.S.C. § 601 (1982).

As indicated earlier, the 1972 Certificate of Location [and] Amended Notice of Location asserted that the Grey Mound #2 claim was not confined to lots 8 and 9, SW 1/4 of sec. 6 as described in the 1955 location notice, but also embraced lots 4 and 5 in the NW 1/4 of sec. 6 (the same land litigated as the Grey Mound #1 claim in the 1961 proceeding) plus 30 acres in adjoining sec. 1. As noted previously, lots 4 and 5 were withdrawn from entry under the mining laws by the grant of a material site right-of-way to the State of Utah on September 12, 1961, and the District Court affirmed the Board's determination of no discovery on lots 8 and 9. Judge Mesch observed:

The right-of-way was granted subject to "[a]ll valid rights existing on the date of the grant", i.e., September 12, 1961. A mining claim in existence on the date of the grant would not be a valid existing right unless the requirements of the mining laws, including the discovery of a valuable mineral deposit, had been met on the date of the grant.

(Decision at 12). As to lots 8 and 9, the Judge concluded:

Insofar as the original land is concerned, the mining claimants would have a recognizable possessory title to the land under the 1955 location, if they were, in fact, the real parties in interest and not simply "straw men" for the community. The possessory title would, however, be meaningless unless lots 4 and 5 were effectively added to the [Grey Mound #2 claim] claim by the 1972 amendment. This conclusion is dictated because the United States District Court affirmed the decision of the Board of Land Appeals finding that there was no discovery within lots 8 and 9, and specifically limited the discovery question to lots 4 and 5. Accordingly, if lots 4 and 5 were not effectively added to the claim by the 1972 amendment, the claim would be null and void because it would not contain any land that could be used to show that the claim had been perfected by the discovery of a valuable mineral deposit. (Emphasis added.)

(Decision at 40). As to lots 4 and 5, the land added to the Grey Mound #2 claim by the 1972 Certificate of Location [and] Amended Notice of Location, the Judge's finding is as follows:

An amended location relates back to the date of the original location and preserves the rights associated with the earlier location, including superiority to subsequent withdrawals as to all land included in the earlier location. The inclusion of new land in an amended location is impermissible [sic] in the face of an intervening withdrawal; and if the new land was withdrawn subsequent to the original location and prior to the amended location, as was done in this case, the claim would be null and void ab initio as to the new land included in the amended location. [Citations omitted.]

(Decision at 41).

Appellants' assignment of error on this point is limited to lots 4 and 5. They contend that lots 4 and 5 were not withdrawn by the 1961 right-of-way grant, in effect, because "there had been no final decision" with regard to discovery on those lands. Appellants refer to the remand by the District Court of Utah stating that the Department should make a determination as to whether there was a discovery on lots 4 and 5 prior to July 23, 1955.

[2] An amended location is a location which is made in furtherance of an earlier valid location. R. Gail Tibbetts, 43 IBLA 210, 216, 86 I.D. 538, 541 (1979), overruled in part on other grounds, Hugh B. Fate, Jr., 86 IBLA 215 (1985). In contrast, a relocation, being adverse to an original location, does not relate back to the date of filing of the original notice of location. American Resources, Ltd., 44 IBLA 220, 223 (1979).

To the extent that the 1972 Certificate of Location [and] Amended Notice of Location describes land added to the Grey Mound #2 claim and not embraced in the 1955 location notice, it must be considered, as to those lands added, a new location or a relocation rather than an amended location. As such, the rights of the locators date from 1972. See Fairfield Mining Co., 66 IBLA 115, 118 (1982). Since the 1972 location was subsequent to the 1961 withdrawal which withdrew lots 4 and 5, the claim was null and void ab initio to the extent it purported to embrace these lands. Appellants totally ignore this critical analysis. As the Judge pointed out, if land withdrawn subsequent to an original location could be included in an amended location, the purposes of Departmental withdrawals would be frustrated and withdrawals would be without effect. To establish that a location of land embraced in a withdrawal made after the withdrawal is actually an amendment of a prior location made before the withdrawal, a claimant must show that the earlier location included the portion of the claim subject to the withdrawal. Russell Hoffman (On Reconsideration), 87 IBLA 146 (1985); Grace P. Crocker, 73 IBLA 78 (1983). Although the court overturned the prior Board ruling that the 1961 hearing was res judicata with respect to the issue of discovery in lots 4 and 5 (Pits Nos. 1 and 2) at the time it remanded the case to determine whether appellants had established possessory rights to the land embraced in the Grey Mound #2 as described in the 1972 location notice, this does not support a finding that, apart from such possessory rights, a 1955 location notice may be amended in 1972 to embrace land withdrawn from location in 1955 (for common variety minerals) and in 1961.

Although Judge Mesch considered that his rulings on the first two issues were dispositive of the appeal, he went on to rule on the question of whether the Grey Mound cinders were a common variety under the Act of July 23, 1955, as amended, 30 U.S.C. § 611 (1982). As a preliminary matter, we affirm the finding of Judge Mesch that the question of whether the cinders for which the claim was located are a common variety has been conclusively determined in previous proceedings between the parties to this case (Decision at 47-48). As noted by the Judge Mesch, the testimony at the 1961 hearing was to the effect that the cinders in this deposit had no unique physical properties giving them a distinct and special value as compared to other cinders (I Tr. 16-17, 19, 27-28, 41). Hearing Examiner Black found in his January 15, 1962, decision that the Government had established a prima facie case that the

cinders were a common variety (Decision at 4). Further, he concluded that the fact the claim contained a "good grade of cinders" did not make the cinders an uncommon variety since they were used for the same purposes as other cinders in the area (Decision at 5). Similarly, as noted by the Administrative Law Judge, testimony at the 1976 hearing established the cinders were used as a substitute for gravel, which latter material is scarce in the area (II Tr. 159, 188, 232, 389, 957). Further, testimony at the 1976 hearing indicated the cinders at Little Creek Knoll have no unique and special value when compared with cinders from other cones and are a common variety (II Tr. 51, 125-26, 145, 173). For this reason, Judge Rampton, who had presided at the 1976 hearing, found from the evidence at the 1976 hearing that the cinders on Little Creek Knoll were a common variety (Decision at 6-7, reported at 39 IBLA 354-55). <sup>6/</sup> The Board affirmed this holding on appeal. United States v. Johnson, *supra* at 346. This finding was not disturbed by the District Court order remanding the case. In light of our holding on this issue, we find it unnecessary to examine Judge Mesch's conclusion that even if the cinders had a unique characteristic the cinders were still a common variety.

[3] The final issue is whether assuming, contrary to our above holdings that appellants had established possessory rights to lots 4 and 5 prior to the 1944 location and that the lots were, therefore, properly added to the amended Grey Mound #2 at that time, the Grey Mound #2 claim was timely perfected by the discovery of a valuable mineral deposit within lots 4 and 5 of sec. 6. A valuable mineral deposit has been discovered where minerals have been found in such quantity and quality as to justify a person of ordinary prudence in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Chrisman v. Miller, 197 U.S. 313 (1905). This so-called "prudent man" test has been augmented by the "marketability test," which requires a showing that the mineral may be extracted, removed, and marketed at a profit. United States v. Coleman, 390 U.S. 599 (1968).

Section 3 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 611 (1982), declared that deposits of common varieties of sand, gravel, building stone, cinders, and certain other materials would no longer be deemed valuable mineral deposits under the mining laws. In order for a mining claim for a common variety of mineral, located prior to the Act of July 23, 1955, to be sustained as a claim validated by a discovery, the prudent man/marketability test of discovery must have been met at the time of the Act and reasonably continuously thereafter up to and including the time of a contest hearing.

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<sup>6/</sup> Judge Rampton also found there was no testimony that the cinders commanded a higher price in the market place as a result of any distinct qualities they may have as required to establish an uncommon variety, citing United States v. U.S. Minerals Development Corp., 75 I.D. 127 (1968) (Decision at 6, reported at 39 IBLA 354).

Where the land is closed to location under the mining laws subsequent to location of the mining claim, the claim must be supported by discovery at the time of the withdrawal. United States v. Williamson, 45 IBLA 264, 87 I.D. 34 (1980), and cases there cited. The Judge posed the following specific questions to be answered in resolving the issue:

1. If the mining claimants are otherwise entitled to obtain the remedial benefits of 30 U.S.C. § 38 -- there was, in fact, a pre-1955 mining claim in existence that the mining claimants held and worked and they exercised actual, open, and exclusive possession of the land covered by the mining claim -- was the market, for uses other than that to which ordinary earth or rock could be put, sufficiently profitable to attract the efforts of a person of ordinary prudence as of March 2, 1948, and for the following seven year period up to the location of the four Grey Mound claims on March 2, 1955?

2. If the cinders are a common variety, was the market, for uses other than that to which ordinary earth or rock could be put, sufficiently profitable to attract the efforts of a person of ordinary prudence as of July 23, 1955, when the common varieties act was adopted?

3. If the cinders are an uncommon variety, was the market, for use as aggregate for concrete -- which is the only use for which the cinders might have a distinct and special economic value -- sufficiently profitable to attract the efforts of a person of ordinary prudence as of September 12, 1961, when the material site permit was issued?

(Decision at 51-52).

The Administrative Law Judge summarized the relevant evidence as follows:

The Evidence at the 1961 Hearing

The evidence presented at the hearing on September 13, 1961 -- which I consider to be more reliable and trustworthy with respect to the crucial dates than the evidence presented years later at the 1976 and the 1984 hearings -- established that:

1. There are numerous cinder cones in Southern Utah and Northern Arizona and in the general area of Little Creek Knoll (I Tr. 16, 17, 19, 26); Little Creek Knoll is the closest cinder cone to the community of Colorado City-Hildale (I Tr. 52); with the exception of the community of Colorado City-Hildale, there are four population centers or markets in Southern Utah, and they all have deposits of cinders closer to them than Little Creek Knoll (I Tr. 19, 28).

2. The agreed population of the community of Colorado City-Hildale was approximately 400 people on September 13, 1961 (I Tr. 34, 52); in "1954 or 1955 most of the population was out of there" -- "better than two hundred people moved away at that time" and this left a population of about 150 people (I Tr. 89, 90) -- the date of exodus was later pin-pointed as July of 1953, and the people were gone for about three years (II Tr. 15).

3. As of 1960, pit No. 1 in lot 4 was in an abandoned state and very few cinders had been removed from that pit (I Tr. 17, 18, 29) -- it was later established that from 200 to 300 yards of cinders were removed from pit No. 1 from the time of its opening in 1945, to its abandonment in 1951 (II Tr. 39, 122, 175, 464, 1016).

4. As of 1960, an estimated 3,300 yards of cinders had been removed from pit No. 2 in lot 5 following its opening by the Utah State Highway Department in 1951, and of that amount, the Utah State Highway Department used about 3,000 yards in 1951 for road work (I Tr. 22, 28, 39, 48, 49) -- it was later established that the State used the cinders to fill deep ruts in an old dirt State road (II Tr. 94, 97); Mojave County, Arizona used a small quantity of cinders in the late 1940's and quite a few cinders in the early 1950's for road work (I Tr. 91).

5. The community of Colorado City-Hildale used cinders from pit Nos. 1 and 2, at one time or another over the years, from 1945 to 1961, for: "drain fields, where they improved the community" -- for insulation, by pouring into hollow cinder blocks -- in a little hand-operated block machine to make cinder blocks for two houses in the early 1940's -- as aggregate, in place of gravel which was not readily available, for concrete -- as aggregate, in place of fine sand, for plaster -- in shallow wells, because of quicksand -- on roads and yards, because of the fine blow sand -- as a base in driveways -- in most of the streets "in some place or other" -- and the uses "have been of value to the community" (I Tr. 54-59, 84-88).

6. The mining claimants made no cash sales of any cinders, except for one sale of 1,100 tons for \$110 in the summer of 1961 to a construction company doing road work for the State of Arizona (I Tr. 59, 61, 67, 95; I Ex. No. C); in the spring of 1961, the mining claimants entered into an option agreement with the Utah State Highway Department under which the State could remove road building material from the Grey Mound #1 claim embracing the NW 1/4 of section 6 for a fee of .05 per cubic yard (I Tr. 61; I Ex. No. B); and later during 1961, the Utah State Highway Department removed cinders from pit No. 2 for road work (I Tr. 35, 36) -- it was later established that the State used the cinders as base gravel and surface gravel on a State road, and that the

State did not pay any money to the mining claimants for the material because of the contest of the Grey Mound #1 claims (II Tr. 98, 574, 641).

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#### The Evidence at the 1976 Hearing

The evidence presented by the BLM at the 1976 hearing established that: the market for cinders from Little Creek Knoll was limited, even as late as 1976, to the community of Colorado City-Hildale because there are other deposits of cinders suitable and more available for use in other population centers in Southern Utah and Northern Arizona (II Tr. 52, 170, 187); the amount of cinders used prior to 1960 in the community of Colorado City-Hildale, and for other than state highway purposes, was on the order of 500 to 600 yards as shown by volumetric measurements of pit Nos. 1 and 2 in 1961 (II Tr. 166, 188); and, if it is assumed that all of the approximately 500 to 600 yards of cinders were removed between 1955 and 1960 -- which is an incorrect assumption, but of benefit to the mining claimants -- this would not constitute a sufficient market to attract the efforts of a person of ordinary prudence as of July 23, 1955 (II Tr. 53, 132, 177, 186-196).

The evidence presented by the mining claimants at the 1976 hearing is voluminous, vague, conflicting, and confusing; and it cannot readily by [sic] equated or tied to the crucial periods of time, i.e., March 2, 1948, July 23, 1955, and September 12, 1961. The most pertinent and understandable evidence presented in behalf of the mining claimants consisted of the following:

1. A statement in a market study prepared under the direction of Mr. Tognoni (II Ex. No. 0, p. 1) showing the extremely isolated location of the community of Colorado City-Hildale and the Little Creek Knoll cinder cone, to wit:

Interstate Highway 15 crosses from Nevada thru the northwest corner of Arizona going northeast into St. George thru Harrisburg Junction and Cedar City, Utah. To get to Grey Mound #2 claim, one leaves I-15 at Harrisburg Junction and goes 21 miles southeast on Utah 15 to Hurricane, then turn on to Utah 59 and travel southeast 48 miles to the Arizona - Utah line. One and one half miles to the south, just before the state line, is the Little Creek Knoll upon which the Grey Mound #2 claim is located. At the state line the paved road becomes Arizona 389. Two miles east on Arizona 389 is the turnoff to the north into Colorado City.

2. The testimony of Mr. Tognoni, who prepared the 1972 location and amendment document, the patent application and supporting documents, and the market study for the mining claimants, that "[t]he principal market area prior to 1955 was the Hildale-Colorado City area \* \* \* and the attendant road systems". (II Tr. 951).

3. A tabulation in the Tognoni market study (II Ex. No. 0, p. 28-34) showing the size of the community of Colorado City-Hildale through the years and the market that one might expect to be generated by such a community. The tabulation shows that:

(i) At the end of 1944, there were 8 residential and 1 non-residential buildings in the community. The non-residential building was known as "Hildale Office". (II Ex. No. 0, p. 33).

(ii) From the beginning of 1945 to the end of 1950, there were 11 residential and 1 non-residential buildings constructed in the community. This would amount to a construction rate of approximately 2 buildings per year. The non-residential building was known as "Twin City Waterworks Shop". (II Ex. No. 0, p. 33).

(iii) From the beginning of 1951 to July 23, 1955, there were 7 residential and 1 non-residential buildings constructed in the community. This would amount to a construction rate of less than 2 buildings per year. The non-residential building was known as "General Supply". (II Ex. No. 0, p. 33). It was a general store. (II Tr. 257).

(iv) From July 23, 1955 through 1961, there were 11 residential and 3 non-residential buildings constructed in the community. This would amount to a construction rate of approximately 2 buildings per year. Of the total construction during this period, no buildings were constructed during the second half of 1955 -- 1 residential building was constructed in 1956 -- no buildings were constructed in 1957 -- 1 residential building was constructed in 1958 -- no buildings were constructed in 1959 -- 8 residential and 3 non-residential buildings were constructed in 1960 -- 1 residential building was constructed in 1961. The 3 non-residential buildings constructed in 1960 were known as the "Academy", which was a school, the "Dairy", and "John John". (II Ex. No. 0, p. 34).

4. A statement in the Tognoni market study (II Ex. No. 0, p. 35) that the residences in existence on the date of the study,

i.e., December 15, 1976, had an "average of seventy [six] yards [of cinders] per residence, [which] includes cinder concrete aggregate used in basement floors and walls and cinders used in building block insulation, around septic tanks and in drain fields".

I believe the figure of 76 yards per residence is overstated. For example, in the supplement to the patent application, the mining claimants stated that 200 cubic yards of cinders had been extracted from pit No. 1. (II Ex. No. A). Pit No. 1 was opened in 1945 and abandoned in February of 1951, when pit No. 2 was opened. (I Tr. 17, 18, 24; II Tr. 95, 96, 201-204, 373, 605-607). This would mean that, at the best, 200 yards of cinders were used in the 11 residential and 1 non-residential buildings constructed from the beginning of 1945 to the end of 1950, or approximately 16.6 yards per building. This assumes that all of the 200 yards of cinders were used in building construction and that no cinders were used on roads, driveways, or yards.

Nevertheless, accepting the Tognoni figure of 76 yards per residence, this would mean that for the approximate 10 1/2-year period from 1945 to July 23, 1955 -- during which 18 residential buildings were constructed -- that 1,368 yards of cinders were used for residential purposes. At .05 per yard, which is the amount the mining claimants agreed to sell cinders for to the State of Utah in 1961, and the only negotiated sale of cinders by the yard by the mining claimants between 1945 and 1976, this would amount to \$68.40, or approximately \$6.50 per year for the 10 1/2-year period.

5. Statements in the Tognoni market study (II Ex. No. 0, p. 35) that 2,000 yards of cinders were used for "[c]inder concrete aggregate used in commercial building floors, foundations, footings and cinder block insulation" and 5,000 yards of cinders were used for "[s]tabilization of blow sand in business area", in the community of Colorado City-Hildale as of the date of the market study, i.e., December 15, 1976.

Accepting these figures, which I believe are overstated, and using an average of 175 yards for the 40 business buildings in existence on the date of the study in 1976, this would mean that for the approximate 10 1/2-year period from 1945 to July 23, 1955 -- during which 2 business buildings were constructed -- that 350 yards of cinders were used for business purposes. At .05 per yard, this would amount to \$17.50, or approximately \$1.66 per year for the 10 1/2-year period.

6. A bar graph in the Tognoni market study (II Ex. No. 0, p. 43) showing that an average of about 850 yards of cinders per year was used during the 4-year period prior to 1950. This would amount to 3,400 yards of cinders. The figure cannot be reconciled with the statement in the supplement to the patent application that only 200 yards of cinders were removed from pit No. 1

from the time of its opening in 1945 to the time pit No. 2 was opened in 1951. (II Ex. No. A). Nevertheless, accepting the Tognoni figure of 850 yards per year, this would amount, at .05 per yard, to a return of \$42.50 per year between 1946 and 1950.

7. A bar graph in the Tognoni market study (II Ex. No. 0, p. 43) which the mining claimants assert in their opening brief shows that "an average of 1,850 cubic yards per year" was removed "between 1950 and 1955 (II Exh. O, p. 43, Fig. M-3; III Exh. B, p. 3) for use in the Colorado City-Hildale area". (p. 5).

The figure of 1,850 yards per year, and, in fact, all of the Tognoni yardage figures, was arrived at by Mr. Tognoni by measuring the pits in the 1970's and arriving at estimated production figures as of that time; by traveling through the community in the 1970's and estimating the amount of cinders used on roads, other surface areas, and for other purposes, such as, for aggregate in concrete and for insulation by filling hollow cinder blocks; and by estimating when during the 31-year period from 1945 to 1976 the cinders had been placed on roads, other surface areas, and used for other purposes. (II Tr. 724, 891, 1028, 1029; II Ex. No. 0, p. 35; III Tr. 241). The Tognoni average of 1,850 yards per year includes the 3,000 yards of cinders used by the State of Utah in 1951. (II Ex. No. 0, p. 35; III Tr. 371).

For the 5-year period, and crediting the one isolated use by the State of Utah in 1951 to use by the community of Colorado City-Hildale, the Tognoni figure would amount to 9,250 yards of cinders. This is over 2 1/2 times the estimated amount removed during the entire period from prior to 1945 to 1960, i.e., 3,600 yards, at the time of the 1961 hearing, when the pits were in a much better condition to measure and when more accurate estimates of recent production could be made.

The figure of 1,850 yards per year between 1950 and 1955 cannot be reconciled with (i) the statement in the supplement to the patent application that only 200 yards were removed from pit No. 1 from the time of its opening in 1945 to the time pit No. 2 was opened in 1951 (II Ex. No. A); and (ii) the fact that volumetric measurements of pit Nos. 1 and 2 in 1960 showed that only 3,600 yards of cinders had been removed from the 2 pits over the entire period from prior to 1945 to 1960, and of that amount, the State of Utah used 3,000 yards in 1951 (I Tr. 22, 28, 39, 48, 49; II Tr. 166, 188).

Nevertheless, accepting the Tognoni figure of 1,850 yards per year, this would amount, at .05 per yard, the only actual negotiated sale of cinders by the yard from 1945 to 1976, to a return of \$92.50 per year between 1950 and 1955. This would not

equal the \$100 expenditure required for annual assessment work on a mining claim. If the one isolated use of 3,000 yards by the State of Utah in 1951 is discounted, or if recognition is given to the fact that the cinders may have been used for purposes for which ordinary earth or rock could have been used, then the marketability and the profitability figures become even more bleak.

8. Information in the Tognoni market study (II Ex. No. O, p. 28, 33, 43) which the mining claimants assert in their opening brief shows that "(w)hile approximately 85% of all cinders used in Colorado City-Hildale between 1950 and 1955 was used for road improvement and stabilization, the remaining 15% was used in the construction of 1 commercial and 7 residential buildings during the same period. (II Exh. O, p. 28, 33, 43, Fig. M-3)." (p. 5).

This would amount to 277.5 yards per year in building construction (15% of 1,850 yards), or 1,388 yards during the 5-year period, or approximately 174 yards per building. This is over 2 1/4 times the other Tognoni estimate of an average of 76 yards of cinders per residence. Nevertheless, accepting the figure, this would give a return, at .05 per yard, of \$13.88 per year.

9. The testimony of Edson P. Jessop, one of the original locators of the four Grey Mound claims on March 2, 1955, who presented a tabulation (II Ex. No. J) showing the number of cubic yards of concrete containing cinder aggregate used in the community of Colorado City-Hildale from 1943 to 1976.

I find Mr. Jessop's testimony and his tabulation much more reliable and trustworthy than the Tognoni market study, which relied, in some unfathomable way, on the Jessop tabulation. The Jessop tabulation does not show the amount of cinders used in each cubic yard of concrete. However, Mr. Jessop testified that the concrete was made with "one part cement to not more than four parts sand and cinders" and that "there is an approximate fifty percent volume of cinders per fifty percent volume of sand". (II Tr. 394-399). The Jessop tabulation, which was arbitrarily broken down by meaningless periods of time, shows the following up to and beyond the crucial periods of time, with the cinders in the concrete figured at two-fifths of a cubic yard for each cubic yard of concrete:

<u>Period of Time</u>	<u>Cubic Yards of Concrete</u>	<u>Cubic Yards of Cinders</u>
1943-1946	308	123.2
1947-1949	62	24.8
1950-1954	137	54.8
1955-1959	86	34.4
1960-1964	1,117	446.8

1965-1969	1,289	515.6
1970-1974	419	167.6
1975-1976	600	120.0

From 1943 through 1954, a period of 12 years, the community used 507 yards of concrete containing 202.8 yards of cinders from Little Creek Knoll or approximately 17 yards of cinders per year for concrete aggregate. For the period from 1955 to the crucial date of September 12, 1961, the community used something less -- and considerably less, considering the increase in building activity after 1961 -- than 1,203 yards of concrete containing less than 481 yards of cinders, or something considerably less than 68 yards of cinders per year for concrete aggregate.

(Decision at 52-54, 55-61). We adopt this statement of facts as set forth by the Administrative Law Judge.

Judge Mesch concluded on the basis of the evidence that the market for the cinders was not sufficiently profitable either in 1948, 1955, or 1961 to justify a person of ordinary prudence in investing time and money in an effort to develop a paying mine on Little Creek Knoll (Decision at 62).

Appellants do not dispute the essential facts as outlined by Judge Mesch. However, they do challenge his conclusions, contending that he placed excessive emphasis on extraction and sales data. Appellants point out that the community used a barter economy where goods were often exchanged rather than being purchased or sold for cash. Appellants note also that in determining marketability, evidence of sales is only one factor and that lack of evidence of sales need not be conclusive proof of lack of value, citing Verrue v. United States, 457 F.2d 1202 (9th Cir. 1972).

[4] We agree that lack of evidence of sales of cinders from the claim is not conclusive on the issue of marketability. However, the presence of a market sufficient to justify a reasonable and prudent person in the expenditure of his time and money in the expectation of developing a profitable mine must be established. The case of United States v. Chapman, A-30581 (July 16, 1968), involved an appeal from a contest of a mining claim located prior to 1955 for a common variety of cinders which bore certain significant similarities to appellants' case. In that appeal cinders taken from the claim were used extensively in highway, street, and driveway construction. Further, claimants received no compensation for cinders, although they were removed from the claim with their consent. The Department held that the lack of evidence of a profitable market for the cinders coupled with evidence that thousands of tons cinders had been removed from the claim with claimants' permission at no expense other than the operating costs of the parties removing the cinders and without payment of compensation to claimants sustained a finding of lack of discovery of a valuable mineral deposit within the meaning of the mining law of 1872. United States v. Chapman, *supra*. We note that material which is principally valuable for fill purposes, for road base, or for ballast, for which ordinary earth and rock may be used, is not locatable

under the mining laws (and was not locatable prior to 1955), and even if the material is valuable for other purposes, its value for the former purposes cannot be considered in determining marketability. United States v. Verdugo & Miller, Inc., 37 IBLA 277 (1978); United States v. Osborne, 28 IBLA 13 (1976); United States v. Baker, 23 IBLA 319 (1976). The evidence in this case is simply overwhelming that as of 1955, when common varieties of cinders were withdrawn from location under the mining law (and in 1961 when lots 4 and 5 were withdrawn from mining), there was no market for the cinders from Little Creek Knoll which would justify a person of reasonable prudence in expending his time and money in an attempt to develop a paying mine.

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

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C. Randall Grant, Jr.  
Administrative Judge

We concur:

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Will A. Irwin  
Administrative Judge

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James L. Burski  
Administrative Judge

## APPENDIX A

<u>Name of Claim</u>	<u>Date of Location</u>	<u>Date Recorded</u>	<u>Locators</u>
Grey Mound #1	3/2/55	3/30/55	Richard Jessop Edson Jessop Fred Jessop Dan Jessop Louis Barlow Joseph Barlow Daniel Barlow Floyd Spencer
Grey Mound #2	3/2/55	3/30/55	Richard Jessop Edson Jessop Fred Jessop Dan Jessop Leroy Johnson Joseph Barlow Daniel Barlow Floyd Spencer
Grey Mound #3	3/2/55	3/30/55	Edson Jessop Fred Jessop Dan Jessop Leroy Johnson Joseph Barlow Daniel Barlow Floyd Spencer Louis Barlow
Grey Mound #4	3/2/55	3/30/55	Fred Jessop Dan Jessop Leroy Johnson
Grey Mound #2 (as amended)	4/19/45	2/17/72	Leroy S. Johnson Joseph I. Barlow Daniel Barlow Richard S. Jessop Edson P. Jessop Fred M. Jessop Dan C. Jessop Samuel S. Barlow

