

**Editor's note: Reconsideration denied by Order dated Jan. 26, 1989; Appealed -- aff'd, Civ.No. 89-0646 PHX PGR (D.Ariz. March 31, 1992), appeal filed No. 92-16115 (9th Cir. May 29, 1992); aff'd, April 1, 1993 (not for publication); petition for cert filed No. 93-598 (S.Ct. Sept. 2, 1993); 62 LW 3299; dismissed pursuant to Rule 46 (essentially withdrawal) (Nov. 12, 1993), 114 S.Ct. 463**

UNITED STATES  
v.  
FRANK AND WANITA MELLUZZO

IBLA 86-1387 Decided November 4, 1988

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer declaring the Nita Jean Nos. 3 and 4 mining claims invalid. A 034008-1.

Affirmed.

1. Evidence: Credibility of Witnesses -- Mining Claims: Determination of Validity

An Administrative Law Judge's findings of credibility will receive considerable deference when reviewed on appeal; thus, where an Administrative Law Judge finds that the testimony of a witness in a mining claim contest has been impeached by prior inconsistent statements made in previous contests, that finding will also be accorded considerable deference.

2. Mining Claims: Common Varieties of Minerals: Generally -- Mining Claims: Determination of Validity -- Mining Claims: Discovery: Marketability -- Mining Claims: Marketability

A mining claimant who asserts entitlement to consideration of group development of his building stone claims must provide evidence that such claims are susceptible to group development, including identification of the specific claims involved, their relative location, and cost and production figures for such claims.

APPEARANCES: W. Scott Donaldson, Esq., Phoenix, Arizona, for appellants; Fritz L. Goreham, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Frank and Wanita Melluzzo (contestees, appellants) have appealed from a May 12, 1986, decision of Administrative Law Judge Harvey C. Sweitzer,

finding the Nita Jean Nos. 3 and 4 placer mining claims (A MC 72246 and A MC 72247) (also known as the Last Chance Nos. 1 and 2) invalid for lack of discovery of a valuable mineral deposit. The two claims, located by appellants on April 4, 1955, are situated on lot 26, in the NW 1/4, sec. 21, T. 3 N., R. 3 E., Gila and Salt River Meridian, Maricopa County, Arizona.

BLM initiated this mining claim contest on April 7, 1983, charging, inter alia, lack of discovery of a valuable mineral deposit. 1/ From March 28 to April 4, 1984, Judge Sweitzer held an evidentiary hearing on the contest complaint.

At the conclusion of the evidentiary hearing, the parties agreed to submit briefs on the issue of whether Frank Melluzzo's hearing testimony had been impeached by inconsistent statements in earlier proceedings involving different mining claims. On November 9, 1984, after reviewing those briefs and the relevant evidence, Judge Sweitzer issued an order styled "Provisional Findings That the Testimony of Frank Melluzzo Has Been Impeached." Thereafter, Judge Sweitzer allowed Melluzzo to be deposed to answer or explain his prior statements. Melluzzo's explanatory deposition was filed with Judge Sweitzer on February 25, 1985. On March 7, 1985, Judge Sweitzer called for further briefs covering all issues of the case. Contestees objected to that briefing schedule and requested instead an additional evidentiary hearing to allow them the opportunity to rehabilitate Melluzzo's testimony. Judge Sweitzer denied that request in an order dated May 20, 1985. On August 8, 1985, Judge Sweitzer denied contestees' request that the May 20, 1985, order be certified to this Board for interlocutory review. By order dated October 4, 1985, this Board denied permission for interlocutory review. 2/

Judge Sweitzer issued his final decision on May 12, 1986. He found that inconsistencies between Melluzzo's testimony at the 1984 hearing and at previous hearings regarding pre-July 23, 1955, profits and production and sources of stone used for various building projects impeached his credibility as to those matters. Judge Sweitzer found the explanations offered

---

1/ On Sept. 16, 1969, BLM issued a contest complaint charging that these claims were null and void ab initio. On Mar. 6, 1974, the Melluzzos applied for patent to the Nita Jean Nos. 3 and 4 claims. On Dec. 10, 1974, after BLM had moved to withdraw the complaint, Administrative Law Judge E. Kendall Clarke issued an order dismissing the contest without prejudice. However, on June 5, 1978, BLM rejected the patent application.

2/ In a complaint filed with the U.S. District Court for the District of Arizona, the Melluzzos charged that both Judge Sweitzer and the Board had abused their discretion in their respective determinations. They also asked the court to order Judge Sweitzer to hold a separate hearing on the issue of credibility and to enjoin further Departmental proceedings pending resolution in the district court. Instead, the district court dismissed the action, declining to overturn the Department's denial of an interlocutory appeal. Melluzzo v. Hodel, Civ. No. 85-2505 PHZ CLH (D. Ariz. June 30, 1986).

in the deposition "were generally vague, and completely uncorroborated" (Decision at 7). Comparisons of Melluzzo's statements in the 1984 evidentiary hearing with those in past contest hearings held in 1956 and 1964 which involved other claims led Judge Sweitzer to "find that in each of the seven enumerated instances of inconsistency, the prior, rather than the present testimony, represents the truth of the matter asserted" (Decision at 11). However, rather than reject the balance of Melluzzo's testimony, Judge Sweitzer decided to accord it little weight (Decision at 11).

The documentary evidence and remaining testimony persuaded Judge Sweitzer that the material on the Nita Jean Nos. 3 and 4 claims was a common variety of building stone within the meaning of section 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1982), and that on July 23, 1955, there was not a sufficient market for the stone to justify development by a person of ordinary prudence. Thus, he concluded that the Melluzzos failed to show the discovery of a valuable mineral deposit within the limits of the Nita Jean Nos. 3 and 4 claims as of July 23, 1955. Therefore, he declared that the claims were invalid and that further consideration of other charges in the complaint was unnecessary.

On appeal to this Board, appellants dispute Judge Sweitzer's findings that Melluzzo's testimony was impeached. Appellants counter the contradictions and inconsistencies Judge Sweitzer found with the explanations presented in Melluzzo's deposition. Appellants claim the lack of an additional evidentiary hearing for the purpose of rehabilitating Melluzzo's testimony denied them due process of law. They claim that right was reserved at the hearing (Tr. 1014-16). Appellants also argue that BLM did not carry its burden of proof with regard to the issue of discovery. They assert that the Government failed to establish that the stone was not marketable under the standards of proof set forth in Charlestone Stone Products Co. v. Andrus, 553 F.2d 1209 (9th Cir. 1977), overruled on other grounds, 436 U.S. 604 (1978). Appellants assert that testimony by their own witnesses overcame the testimony of the Government witnesses concerning marketability and established by a preponderance of the evidence that the disputed claims were valid. Appellants claim that they established the validity of the disputed claims by showing that stone from the claims was special and distinct and successfully marketed from the date of location to the present. Appellants insist that market demand can be spread over all of appellants' building stone claims in order to establish that the stone from these claims, considered as a group, was marketable (Second Supplement to Statement of Reasons (SOR) at 22-24). They invoke Board decisions which allow marketability determinations based on groups of claims, rather than on individual claims, and insist that, taken as a unified operation, their claims are valid.

BLM responds that Judge Sweitzer properly decided to give little weight to Melluzzo's testimony. BLM agrees with his findings and conclusions and asserts that it met its burden of proof and established a prima facie case of invalidity of these claims and that appellants failed to sustain their burden.

We have thoroughly reviewed the record in this case and the arguments advanced by appellants and BLM. Judge Sweitzer's decision set forth a complete summary of the testimony and other relevant evidence, as well as the applicable law. We agree with Judge Sweitzer's findings and conclusions and adopt them as our own. A copy of his decision is attached. We add only the following.

Appellants' argument that they were denied due process of law by Judge Sweitzer's refusal to conduct a second evidentiary hearing is completely without merit. As this Board stated in its order dated October 4, 1985, denying permission for interlocutory review:

[D]etermination of the credibility of testimony is normally made following presentation of evidence at a mining claim validity hearing, in connection with issuance by the administrative law judge of his decision. Judge Sweitzer has already afforded contestees the unusual accommodation of providing them a provisional finding that Melluzzo's testimony had been impeached at the hearing, along with an opportunity to present additional evidence to rehabilitate this testimony. This accommodation was more than adequate to protect contestees' rights to present evidence in support of the validity of their claims.

(Order at 3).

[1] The Department traditionally accords considerable weight to the credibility findings of the trier-of-fact. Where resolution of a case depends primarily on such findings, those findings will not lightly be set aside. United States v. Aiken Builders Products, 95 IBLA 55, 58 n.3 (1986); United States v. Chartrand, 11 IBLA 194, 212, 80 I.D. 408, 417-18 (1973). Judge Sweitzer, as the trier-of-fact, had the opportunity to observe Melluzzo's demeanor as he testified and to compare that testimony to the record of testimony given in earlier mining claim contests. Judge Sweitzer found that Melluzzo was not credible in his testimony presented at the 1984 hearing on issues critical to the resolution of this appeal. Our review of the record reveals no justification for overturning the finding of Judge Sweitzer that Melluzzo's 1984 testimony was not believable. Therefore, we affirm Judge Sweitzer's finding that the credibility of Melluzzo's testimony at the 1984 hearing was impeached in seven enumerated instances by inconsistent statements made at earlier hearings involving other building stone claims and that in each instance Melluzzo's prior testimony, rather than his 1984 testimony represents the truth of the matter asserted.

Judge Sweitzer also found that while the Government's evidence concerning 1954 and 1956 aerial photographs of the area embraced by the claims established a weak prima facie case of lack of discovery prior to July 23, 1955, any doubt concerning the strength of that case was removed by analyzing certain testimony given by Frank Melluzzo during a 1964 hearing. Judge Sweitzer concluded that appellants had not established by a preponderance of the evidence that stone was extracted and removed from the Nita Jean Nos. 3 and 4 mining claims, and marketed at a profit as of July 23, 1955.

Appellants take issue with that conclusion, arguing that the Government failed to present a prima facie showing of the invalidity of the claims and asserting that there was a market for stone from the two claims prior to July 23, 1955, and that they established that fact at the hearing.

Judge Sweitzer, in finding a lack of marketability of stone from the claims prior to and as of July 23, 1955, relied on a statement by Frank Melluzzo in a 1964 hearing to the effect that in 1955 he could not make a business of selling stone from any one of his mining claims. Appellants argue that Judge Sweitzer incorrectly applied the law in this case in that he imposed an "independent mine requirement," which this Board found inapplicable in Schlosser v. Pierce, 92 IBLA 109, 93 I.D. 211 (1986). Appellants argue that "[t]he Schlosser case requires claimants and contestants to value and appraise building stone claims as an aggregate" (Third Supplemental SOR at 5).

Judge Sweitzer did not incorrectly apply the law. In fact, he was very careful to explain exactly what he meant. Thus, he stated:

It is important to note why Mr. Melluzzo "could not make a business of selling rocks from any of his claims." The argument could be made that he was merely referring to an economic fact - that as the level of production increases, the cost of producing each unit decreases. In other words, one could argue that what he meant was that he could make a business of selling rocks, but only if he could spread his start-up and operating costs over several of his claims. If all of those costs had to be absorbed by a one claim operation, then that claim could not turn a profit. If this is what Mr. Melluzzo had referred to, then the statement would not be evidence of lack of marketability. When several claims are operated as a group to lower per claim costs, Departmental decisions allow the economics of the group operation to be considered in the marketability equation for each claim. In Re Pacific Coast Molybdenum Co., 90 I.D. 352 (1983); See concurring opinion of Judge Mullen in Cactus Mines Limited, 79 IBLA 20, 32-33 n.2 (1984). In other words, a claim is not invalid for lack of individual marketability if the claimant can show that by spreading operating costs over a group of claims, the per ton costs of production allow the mineral from each claim to be marketed at a profit.

The admission can, and will be used as evidence of lack of marketability, however, because I find Mr. Melluzzo was not referring to costs but to demand. \* \* \* In other words, the meager returns that could be realized from the occasional sales of one kind or color of stone from one claim were not enough to "make a business."

(Decision at 20-21).

[2] The Judge's analysis is not inconsistent with Schlosser which issued in June 1986, subsequent to his decision. Rather, his rationale is closely aligned with those cases which have accepted the practice of considering a group of claims as a mining unit in determining the validity of individual claims. See In Re Pacific Coast Molybdenum Co., *supra*; United States v. Wood, 51 IBLA 301, 87 I.D. 629 (1980); United States v. Martinez, 49 IBLA 360, 87 I.D. 386 (1980). In Schlosser the Board reviewed all those prior cases and others and concluded that a mining claimant is not required to show that each claim he has located will independently support a paying mine when the claims embrace a large, low-grade mineral deposit, such as, in Schlosser, bentonite clay. 92 IBLA at 130-34, 93 I.D. at 223-25. However, evidence of the claims as a unit is not enough to meet the test of discovery; rather, the claimant must show that each claim has mineralization of sufficient quality so that it can be mined, processed, and marketed at a profit. Schlosser, 92 IBLA at 128, 93 I.D. at 222. In United States v. Forsyth, 100 IBLA 185, 94 I.D. 453 (1987), the Board considered an appeal of a decision in a contest of various mining claims located for limestone. The Board stated, in rejecting the independent mine requirement, that a group of contiguous claims could be considered as a unit when determining whether a discovery exists on each claim. Id. at 248-50, 94 I.D. at 488-89; see Cactus Mines Limited, *supra* at 32-33 n.2.

Generally, in cases in which grouping of claims has been considered for the purposes of determining the validity of individual claims, the claims have been contiguous or nearby claims located for a particular mineral deposit. The reason for that is simple; the law of discovery contemplates the development of a "valuable mine." Economics dictate in such a situation that the "mine" be developed so as to maximize the profitable exploitation of the minerals. Contiguous claims or nearby claims lend themselves to group development. Appellants apparently would extend the group development principle to encompass a number of building stone claims. However, they do not specify which of their numerous claims, widely scattered throughout the Phoenix area, were susceptible to group development with the Nita Jean Nos. 3 and No. 4 claims. <sup>3/</sup> No cost or production figures for group development were presented by appellants.

---

<sup>3/</sup> In a Mar. 23, 1965, decision by Chief Hearing Examiner Graydon E. Holt involving four contests (Nos. 10591 through 10594) which included 15 claims located by Frank Melluzzo and others, Chief Hearing Examiner Holt stated: "In addition to the claims in issue Mr. [Frank] Melluzzo has two patented claims, the Arizona Placer containing 20 acres and the Deno S which originally contained 35 acres. Also he has numerous other unpatented mining claims from which he has been taking stone. These latter claims include two Nita Jean claims [Nita Jean Nos. 3 and Nita Jean 4] not in issue, six Enterprise claims not in issue, the White Shale group with eight claims, the P and M Enterprise group with six claims, and the Sunburnt group with six claims (Exh. 28)." (Decision at 3).

As Judge Sweitzer points out in this case, Melluzzo did not intend group development of his building stone claims. What he intended was to have under claim the greatest possible range of colors and gradations of stone such that he could collect stone from those claims and have it on display at his stone yard business site in order to afford his customers the widest possible range of choices. Thus, Judge Sweitzer properly concluded that Melluzzo's statement supported BLM's assertion that there was no discovery prior to or as of July 23, 1955, on either of the claims at issue. Frank Melluzzo was not, at that time, developing a "mine," on either the Nita Jean Nos. 3 or 4 claims.

Appellants argue that the proper standards by which to evaluate the pre-July 23, 1955, marketability of the stone from these claims are those established by the court in Charlestone Stone Products Co. v. Andrus, 553 F.2d at 1214:

The marketability of the pre-July 23, 1955 extractions can be tested by reason of: (1) Accessibility to the claims; (2) Bona fides of the operators in developing the claims; (3) Existence of market demand within reasonable proximity to the claims; and (4) Actual participation in the market.

Judged by these standards, appellants' evidence falls woefully short of establishing marketability of the stone from these claims as of July 23, 1955. Although at that time the claims were apparently accessible by four-wheel drive vehicle, the testimony of BLM's expert regarding the interpretation of aerial photographic evidence established a lack of surface disturbance on the claims between 1954 and 1956. In addition, appellants failed to prove there was a demand for the stone from the Nita Jean Nos. 3 and 4 claims as of July 23, 1955. <sup>4/</sup> Moreover, despite appellants' assertions to the contrary, their evidence of development of the claims and actual participation in the market as of July 23, 1955, with stone from these claims is nominal. Judge Sweitzer correctly found that appellants' evidence showed very little stone marketed from the two claims prior to July 23, 1955, and no evidence of costs of production or profits from sales. Clearly, lack of production and/or sales from a claim cannot serve as the basis of a determination of invalidity where the record contains positive evidence of marketability. Melluzzo v. Morton, 534 F.2d 860, 862-63 (9th Cir. 1976). The record in this case, however, lacks that credible positive evidence of marketability sufficient to sustain appellants' burden.

---

<sup>4/</sup> A review of the record in this case and previous Departmental decisions regarding other building stone claims located by appellants in the Phoenix area indicates that whatever the pre-July 23, 1955, market demand may have been for building stone in that area, it was being adequately supplied by stone from claims other than the ones at issue.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Sweitzer is affirmed.

---

Bruce R. Harris  
Administrative Judge

I concur:

---

John H. Kelly  
Administrative Judge

May 12, 1986

UNITED STATES OF AMERICA, : ARIZONA 034008-1  
:  
Contestant : Involving the Nita Jean  
: # 3 and # 4 (aka Last  
v. : Chance # 1 and # 2),  
: placer mining claims  
FRANK MELLUZZO and : situated on U.S.  
WANITA JEAN MELLUZZO, : Government Lot 26 in  
: the NW 1/4, Sec. 21, T.  
Contestees : 3 N., R. 3 E., GSR  
: Meridian, Maricopa  
: County, Arizona

DECISION

Appearances: Daniel L. Jackson, Esq., Office of the Field  
Solicitor, U.S. Department of Interior,  
Phoenix, Arizona, for contestant;

W. T. Elsing, Esq. (deceased), 1/ Phoenix,  
Arizona; and W. Scott Donaldson, Esq.,  
Phoenix, Arizona, for contestee.

Before: Administrative Law Judge Sweitzer.

This is a proceeding involving the validity of the Nita Jean Nos. 3 and 4 placer mining claims located on April 4, 1955, under the General Mining Law of 1872, as amended, 30 U.S.C. §§ 21-54. Jurisdiction is based on 43 U.S.C. §§ 2, 1201, and 43 CFR Part 4, Subpart E. See, *Cameron v. United States*, 252 U.S. 450 (1919); *Best v. Humboldt Placer Mining Company*, 371 U.S. 334 (1963); and *United States v. O'Leary*, 63 I.D. 341 (1956).

---

1/ Mr. Elsing died subsequent to the hearing.

## Procedural History

This matter commenced on April 7, 1983, when, pursuant to 43 CFR 4.451, the Bureau of Land Management (BLM) issued a complaint against Frank and Wanita Jean Melluzzo ("Melluzzo" or "Contestees") charging:

- a. Valuable minerals have not been found within the limits of the claims so as to constitute a valid discovery within the meaning of the mining laws.
- b. The land within the claims is non-mineral in character.
- c. The material found within the limits of the claims is not a valuable mineral deposit under Section 3 of the Act of July 23, 1955 (69 Stat. 367, 30 USC 601).
- d. The lands are not chiefly valuable for building stone as required by the Act of August 4, 1892 (27 Stat. 348: 30 USC 161).

Contestees, the mining claimants, filed a timely answer denying the charges and affirmatively alleging:

- (1) that valuable minerals have been found within the limits of the unpatented mining claims described above so as to constitute a valid discovery within the meaning of the mining laws;
- (2) that the land within the mining claims is mineral in character, (3) that the material found within the limits of the mining claims is a valuable mineral deposit under Section 3 of the Act of July 23, 1955 (69 Stat. 367, 30 USC 601); and (4) that the lands are also valuable for building stone as described by the Act of August 4, 1892 (27 Stat. 348: 30 USC 161).

A hearing was scheduled for December 1, 1983, but was postponed at contestees' request. The hearing was rescheduled and held in Phoenix, Arizona, from March 28 through April 4, 1984. At the conclusion of the hearing, the parties stipulated to a bifurcated briefing schedule. They first filed briefs on the question of whether the credibility of Frank Melluzzo had been impeached by his giving testimony at this hearing inconsistent with that given in prior hearings. After full consideration of the briefs and relevant evidence, I entered an order on November 9, 1984,

provisionally finding that inconsistencies exist between the past and present testimony of Mr. Melluzzo, and that "in the absence of adequate and sufficient explanation o[r] rehabilitation, said inconsistencies must and will be determined to impeach the credibility and the testimony of the witness."

By an order dated November 30, 1984, I approved a stipulation entered into by the parties allowing Frank Melluzzo to be deposed to "answer or explain his prior statements." This deposition was taken on February 8, 1985. Pursuant to my March 7, 1985 Order, both parties filed briefs covering all issues in the case, including whether or not my provisional finding of impeachment should be sustained. 2/ The entire record and all briefs have been fully considered in reaching this decision.

### Issues

The pleadings and evidence present six issues for decision:

1. Whether my provisional finding that the credibility and testimony of Frank Melluzzo is impeached should be sustained or overruled.
2. Whether the stone on the Nita Jean Nos. 3 and 4 is a common or uncommon variety under Section 3 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 611.

---

2/ The March 7, 1985, Order established a briefing schedule. On March 27, 1985, contestees filed an objection to this schedule, arguing that they should be given further opportunity to rehabilitate Frank Melluzzo, including another evidentiary hearing, prior to briefing the substantive issues. By an Order dated May 20, 1985, I denied this request concluding "[t]he opportunity for rehabilitation has been given and utilized \* \* \*." On July 1, 1985, contestees filed a request for certification for interlocutory review of my May 20 Order. I denied this request on August 8, 1985, and forwarded the matter to the Interior Board of Land Appeals. By Order of October 4, 1985, the Board upheld my August 8 denial noting, "[w]e are obliged to observe that contestees objections to the procedures adopted by Judge Sweitzer are entirely groundless." On November 13, 1985, contestees filed a complaint in the United States District Court for the District of Arizona essentially appealing the October 4, 1985 Order of the Board. So far as is known the matter is currently pending.

3. If the stone is not a common variety, whether a discovery of a valuable mineral deposit has been made on each claim.
4. If the stone is a common variety, whether there was a discovery of a valuable mineral deposit on each claim by July 23, 1955.
5. If "4" is "yes," whether discovery has continued from July 23, 1955, to the date of the hearing.
6. Whether the lands embraced by the claims are chiefly valuable for building stone as required by the Act of August 4, 1892, 30 U.S.C. § 161.

## IMPEACHMENT

### Applicable Law

The impeachment issue is focused on several statements made by Frank Melluzzo in prior hearings that are inconsistent with portions of his testimony given in the present hearing. Such prior inconsistent statements are expressly excluded from the operation of the hearsay rule if the declarant testifies at the proceeding and is subject to cross-examination concerning the statement. Fed. R. Evid. 801(d)(1)(A). <sup>3/</sup> Because they are not hearsay, the statements are admissible as both impeachment and substantive evidence. United States v. Thompson, 708 F.2d 1294, 1303 (8th Cir. 1983); Fed. R. Evid. 801, advisory committee note.

Once the prior inconsistent statement is admitted as substantive evidence, the trier of fact must decide whether or not it is more likely true than the present testimony of the witness. Applied as a matter of law, the principle of "judicial estoppel" precludes a party from establishing a fact by present testimony inconsistent with prior testimony. Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166 (4th Cir. 1982); Eads Hide & Wool Co. v. L. B. Merrill, 252 F.2d 80, 84 (10th Cir. 1958); Scarano v. Central R. Co., 203 F.2d 510, 513 (3d Cir. 1953). The circumstances under which it may be invoked have not been reduced to any general formulation. Allen, 667 F.2d at 1166. Instead, the courts seem to use the principle whenever necessary to protect the

---

<sup>3/</sup> This proceeding is not expressly subject to the Federal Rules of Evidence, but the rules are utilized herein for guidance.

integrity of the judicial process from the use of "intentional self-contradiction \* \* \* as a means of obtaining unfair advantage \* \* \*." Scarano, 203 F.2d at 513. Perhaps the formulation most pertinent to this decision is that expressed in Eads Hide & Wool Co., 252 F.2d at 84:

[Judicial estoppel] is a phase of equitable estoppel which prevents a litigant from maintaining that the facts of his suit are different from those which he urged successfully in prior litigation. [Citations omitted] Where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. [Citation omitted]

#### Discussion

As noted previously, on November 9, 1984, I entered an order provisionally finding that Frank Melluzzo's credibility and testimony had been impeached as a consequence of several inconsistencies between his past and present testimony. Brief accounts of that inconsistent testimony are set out below.

In each of the first five instances, Frank Melluzzo testified at an earlier hearing that the stone that was used in the particular structure in question was from claims not now in contest (i.e. claims other than the Nita Jean Nos. 3 and 4); whereas, at the 1984 hearing, he testified that the stone was produced from the Nita Jean Nos. 3 and 4. The final two instances concern alleged profit and production, further elucidated thereat.

#### Motorola Building:

During the hearing in the 1964 case of United States v. Frank Melluzzo, et al., Contest Nos. 10591, 10592, 10593, 10594, and 10596 (hereinafter referred to as the "1964 Melluzzo case"), Frank Melluzzo testified that all the rock used in the Motorola Building came from the Nita Jean or Nita Jean No. 2 (Tr. 1253-36 of the 1964 Melluzzo case).

During the 1984 hearing, he testified that the rock used in the Motorola Building came from the Nita Jean Nos. 3 or 4 (Tr. 728, 737-38).

Paradise Valley Country Club:

During the hearing in the 1964 Melluzzo case, Frank Melluzzo testified that the stone he supplied for the Paradise Valley Country Club came primarily from the 7th St., Enterprise and Reno claims (Tr. 1187 of the 1964 Melluzzo case).

During the 1984 hearing, he testified that most of the stone he supplied for the Paradise Valley Country Club came from the Nita Jean No. 4 (Tr. 725-728).

Safeway Store Offices:

During the 1956 hearing in the case of Frank Melluzzo v. Mary Jane Call, Arizona No. 9946 (hereinafter referred to as the "1956 Call hearing"), Frank Melluzzo testified that all the stone he supplied for the Safeway Store Offices came from the Nita Jean and Nita Jean No. 1 claims (Tr. 90 of the 1956 Call hearing).

During the 1984 hearing, he testified that all the stone he provided for the Safeway Store Offices came from Nita Jean Nos. 3 and 4 (Tr. 742, 852).

Mercer's Mortuary:

During the hearing in the 1964 Melluzzo case, Frank Melluzzo testified that the rock for the retaining walls at Mercer's Mortuary was quarried at Wickieup, Arizona (which is more than 100 miles from the Nita Jean Nos. 3 and 4 claims) (Tr. 1198 of the 1964 Melluzzo case).

During the 1984 hearing, he testified that "there is a lot of the stone from the Nita Jean 3 and 4 in those walls," referring to the retaining walls at Mercer's Mortuary (Tr. 757).

Senator Goldwater's Home:

During the hearing in the 1964 Melluzzo case, Frank Melluzzo testified that he supplied a total of 300 tons of stone for installation at the Goldwater residence, and that all of that stone came from the Enterprise claim (Tr. 1196-97 in the 1964 Melluzzo case).

During the 1984 hearing, he testified that he supplied a large quantity of stone from the Nita Jean Nos. 3 and 4 claims for this project (Tr. 751).

Other Situations:

Contestant's 6th allegation of inconsistency concerns the profits that Frank Melluzzo testified that he realized from the Nita Jean Nos. 3 and 4. During the 1956 Call hearing, Mr. Melluzzo testified that his gross income from all his stone sales in 1954 was \$ 735, and that this income came solely from the Nita Jean and Nita Jean No. 1 (Tr. 95 of the 1956 Call hearing). Mr. Melluzzo also testified at the hearing in the 1964 Melluzzo case that he could not make a business out of selling rock from any one of his claims (Tr. 1518-20 of the 1964 Melluzzo case).

During the 1984 hearing, he testified that from the time he located the claims, he had always made a profit from the sale of stone from the Nita Jean No. 3 and Nita Jean No. 4 (Tr. 768). (It is unclear whether Mr. Melluzzo meant that he made a profit from the Nita Jean No. 3 and the Nita Jean No. 4 individually, or whether he was referring to the two claims collectively.)

Contestant's 7th allegation of inconsistency concerns the production which contestees claim occurred on the Nita Jean Nos. 3 and 4 prior to 1955. At the 1964 hearing in the Melluzzo case, Frank Melluzzo testified that he had no records of any kind for 1953, 1954, or 1955, and that any estimate of production for those years would be "a wild guess" (Tr. 1024 of the 1964 Melluzzo case).

At the 1984 hearing, Mr. Melluzzo testified that specific tonnages of stone from specific claims were used in pre-July 23, 1955 construction. At the 1956 Call hearing, he testified that his 1955 income of \$ 5,000 was from all his claims including the Nita Jean Nos. 3 and 4 (Tr. 97-98 of the 1956 Call hearing). At the 1984 hearing, he testified that the \$ 5,000 figure did not include income from the Nita Jean Nos. 3 and 4 (Tr. 911-12; see also, Tr. 913-15).

On February 8, 1985, Mr. Melluzzo's deposition was taken in an effort to explain the inconsistencies and thereby rehabilitate his credibility. The explanations offered were generally vague, and completely uncorroborated. The two examples that follow are illustrative. With reference to the testimony concerning the Motorola Building and Safeway Store Offices, Mr. Melluzzo offered the following explanation:

Q. Mr. Melluzzo, what did you mean by your statements that we just cited from the 1964 hearing and from the 1984 hearing?

A. Between the 1964 hearing and the 1984 hearing, I had to have a segregation survey made of the Nita Jeans, the North 7th Street claims and by the segregation survey, it showed that the quarries of the stone was taken off, in fact, were the Nita Jean 4 instead of the Nita Jeans 1 or 2.

Deposition Tr. 9

Knowledge of the relative positions of the four Nita Jean claims is necessary to understand this explanation. The claims roughly form a square, with Nita Jean located in the NW 1/4, Nita Jean 2 in the SW 1/4, Nita Jean 3 in the SE 1/4, and Nita Jean 4 in the NE 1/4 (Ex. RR). As a part of the segregation survey, the surveyor placed stakes every 25 feet along the line separating the Nita Jean and Nita Jean No. 2 from the Nita Jean Nos. 3 and 4 (Deposition Tr. 46). Mr. Melluzzo testified that before seeing those stakes, he "never knew where that line was." Id. After seeing the stakes, he realized that the production he earlier attributed to the Nita Jean and Nita Jean No. 2 actually came from the other side of the line - i.e., the Nita Jean Nos. 3 and 4. 4/

With reference to the testimony concerning Senator Goldwater's home, Mr. Melluzzo explained the inconsistency as follows: that the 1964 testimony referred to a picture he was viewing at the time; that the stone in the specific structures shown in the picture did come from the Enterprise claims; that the 1984 testimony was also in reference to pictures he was viewing at the time; that these pictures depicted structures different from those in the 1964 picture; and that in these different structures can be found the large quantity of stone from the Nita Jean Nos. 3 and 4 (Deposition Tr 16-18).

#### Analysis and Findings

Frank Melluzzo secured patent to Nita Jean and Nita Jean 2 in 1970 or 1971 partly on the basis of the production he now

---

4/ With reference to this explanation, I note that the person who "mined" the stone used in the Motorola building, Marion J. Evertsen, unequivocally stated that it came from the Nita Jean, Nita Jean No. 2 side of the line (Tr. 552, 566-68).

attributes to Nita Jean Nos. 3 and 4 (Ex. TT, Tr. 962). Mr. Melluzzo's "segregation survey" explanation for this "shift" in production is plausible. That is, it is certainly possible that, by virtue of the "segregation survey," he came to know for the first time the exact location of his Nita Jean claims. However, I find this explanation suspect in light of the fact that Mr. Melluzzo was unable or unwilling to state as much when confronted with his 1956 and 1964 testimony at the present hearing. The explanation becomes the more questionable when one considers that in the document specifically intended for such explanations - Contestee's Reply Brief to Contestant's Post-Hearing Impeachment Brief - nothing was mentioned of the segregation survey or its effect on Mr. Melluzzo's present knowledge.

I believe a more probable explanation was given by the IBLA in reference to a surprisingly similar situation involving the same Frank Melluzzo in United States v. Frank and Wanita Melluzzo (Supp. on Judicial Remand), 32 IBLA 46, 54 (1977):

It is obvious to this Board that Melluzzo has accounted for his 1955 income from mining several times over, depending on which group of mining claims were being challenged. At the time of each contest, Melluzzo would simply attribute the bulk of his minerals income to whichever group of claims was under attack.

Again, Mr. Melluzzo is "shifting" production - this time from Nita Jean and Nita Jean No. 2 to Nita Jean Nos. 3 and 4. I find his explanation to be self-serving, completely uncorroborated, and without merit.

Similarly, I believe that the most likely explanation for the inconsistent statements concerning the Goldwater home is that the production originally attributed to the Enterprise claim was simply "shifted" to support the claims now in contest. Mr. Melluzzo contends he was looking at two different areas around the Goldwater home when he gave the apparently contradictory testimony. But a careful reading of the testimony shows that whatever difference exists in what the two pictures depict, Mr. Melluzzo made unequivocal statements that are left unreconciled by his explanation. Thus, at page 1,196 of the transcript from the 1964 Melluzzo case:

QUESTION: X-120.

ANSWER: X-120 was built in the latter part of '55. This is Senator Goldwater's house, a picture of it. I supplied him with around three hundred ton of rock altogether \* \* \*

QUESTION: Where did the stone on that place come from?

ANSWER: That came from the Enterprises.

(Deposition Ex. H, emphasis added.)

At page 751 of the transcript from the present hearing, Mr. Melluzzo stated in reference to the Goldwater home:

The actual home was built out of Navajo ripple rock which came from Gray Mountain in Cameron, which I had shipped, helped quarry and brought it down to his home. Then I supplied the retaining walls, the planters, the waterfalls and all of the retaining wall around his mountain which -- and there is a large quantity of Nita Jean 3 and 4 rock in these jobs (emphasis added).

In his 1964 testimony, Mr. Melluzzo clearly states that his total contribution to the Goldwater job was 300 tons of stone, all from the Enterprise claims. The 1984 testimony, besides switching the source of "a large quantity" of the stone to Nita Jean Nos. 3 and 4, simply provides additional details. Thus we are told: (1) that the "actual home" was built with stone from "Gray Mountain;" and (2) that the stone Mr. Melluzzo supplied from his claims went into the retaining walls, the planters, and the waterfalls. Considering both the 1964 and 1984 testimony, I believe an accurate statement of the facts is that from his Enterprise claims, Mr. Melluzzo supplied a total of 300 tons for the construction of the retaining walls, planters, and waterfalls at Senator Goldwater's residence.

The two preceding examples of Mr. Melluzzo's attempts to explain his inconsistent testimony are representative of all the explanations he gave at his deposition. They are unpersuasive and provide little support for contestees' position on this issue. In short, I find that the inconsistencies remain unexplained.

In relation to this finding, contestant would have me apply the doctrine of "judicial estoppel" to completely preclude

consideration of Mr. Melluzzo's present inconsistent testimony. Admittedly, this case seems to fit squarely within the formulation of the principle quoted earlier. However when, as here, the witness at least attempts to explain the inconsistencies, I believe the more judicious approach is that implicitly sanctioned by the Federal Rules of Evidence - i.e., to weigh the prior inconsistent statement against the present to determine which is more likely true. Toward this end, with regard to Mr. Melluzzo's testimony in the present contest, I reach a conclusion similar to that of the Board in United States v. Frank and Wanita Melluzzo, 32 IBLA at 51:

We are inescapably compelled to conclude both by the totality of the circumstances of this case and by many prior inconsistent statements that Melluzzo's testimony has none of those characteristics ordinarily associated with veracity.

Furthermore, I believe that the prior testimony is more likely to be true because it was given nearer in time to the matters to which it relates and is less likely to be influenced by the interests at stake in the present contest.

In summary, I find that contestees failed to provide the "adequate and sufficient explanation" of the inconsistencies I called for in my November 9, 1984 Order. Therefore, Mr. Melluzzo's credibility was not rehabilitated. Accordingly, the Order is sustained, and is hereby made permanent. In addition, I find that in each of the seven enumerated instances of inconsistency, the prior, rather than the present testimony, represents the truth of the matter asserted.

In anticipation of this finding, contestant argued for the application of the maxim falsus in uno, falsus in omnibus. This rule permits, but does not require, the rejection of all of a witness's testimony when any significant part is found false. See Norfolk & W. Ry. Co. v. McKenzie, 116 F.2d 632, 635 (6th Cir. 1941). The rule has been labeled "inappropriate" and "always treacherous" by one court, 5/ and I decline to apply it here. However, the Board's statement in United States v. Frank and Wanita Melluzzo, 32 IBLA at 57, - "[I]t is clear \* \* \* that much of Melluzzo's testimony is utterly lacking in credibility" - is apropos, and in general, Frank Melluzzo's testimony will be accorded little weight.

---

5/ Phillips v. Crown Central Pet. Corp., 602 F.2d 616, 623 (4th Cir. 1979).

## BURDEN OF PROOF

BLM meets its burden of proof when it has established a prima facie case in support of each of its allegations. To rebut each allegation thus supported, the mining claimant must preponderate on the evidence relevant to that allegation. The claimant need not, however, present evidence in rebuttal to unsupported allegations. United States v. Albert O. Husman, 81 IBLA 271 (1984); United States v. Taylor, 19 IBLA 9 (1975).

Exactly what constitutes a prima facie case is necessarily dependent upon the facts. However, for some common allegations, such as that of "no discovery," the Department has developed guidelines. Thus, when a Government mineral examiner testifies that he has examined a claim and found mineral values insufficient to support a "discovery," a prima facie case of invalidity has been made as respects that charge. United States v. Martinez, 49 IBLA 360 (1980); United States v. Taylor, 19 IBLA 9 (1975). The Court of Appeals, Ninth Circuit, recently added the qualification "that the testifying mineral examiner must be an expert as to the marketability or value of the particular mineral." Rodgers v. Watt, 726 F.2d 1376, 1380 (9th Cir. 1984).

## COMMON VARIETY

### Applicable Law

Section 3 of the Act of July 23, 1955, 30 U.S.C. § 611, withdrew from location under the mining laws, including the Building Stone Act of August 4, 1892, 30 U.S.C. § 161, any "deposit of common varieties of \* \* \* stone." See United States v. Coleman, 390 U.S. 599, 604-05 (1968). That section also provides, however, that a deposit is not a "common variety" if it has some unique property giving it distinct and special value. Whether a deposit has distinct and special value is determined by reference to the following guidelines:

- (1) There must be a comparison of the mineral deposit in question with other deposits of such minerals generally;
- (2) the mineral deposit in question must have a unique property;
- (3) The unique property must give the deposit a distinct and special value;
- (4) if the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use; and
- (5) the distinct

and special value must be reflected by the higher price which the material commands in the market place \* \* \* [or] by reduced costs or overhead so that the profit to the producer would be substantially more while the retail market price would remain competitive \* \* \*.

McClarty v. Secretary of the Interior, 408 F.2d 907, 908-09 (9th Cir. 1969).

### Evidence

Contestant's first witness to give testimony relevant to this issue was Mr. Gary Walker. Mr. Walker holds a B.S. degree in geology from Eastern Washington State College (1971), and has completed 1 1/2 years toward a Masters Degree in metamorphic petrology (Tr. 14, 74). His completed Master's thesis concerns the study of a large area of pre-cambrian metamorphic rock, including schist, the most prevalent type of rock found on the claims in contest (Tr. 14, 74). He is currently the Assistant District Manager for Minerals in the BLM Phoenix District Office (Ex. 2).

Mr. Walker testified that, although the quality of the stone on the claims is inconsistent, in general it is a chloritic schist with the following characteristics: (1) poor cleavage - does not exhibit a reliable cleavage plain; (2) highly fractured and angulated; and (3) stained with hematite and limonite (Tr. 47-48). Based on his examination of several geologic maps of the area (Exs. 5, 5A), and on a geologic report that states there are approximately 8.5 square miles of schist in the mountains surrounding the Nita Jean claims (Ex. 6), Mr. Walker stated that the material found on the claims is very common (Tr. 36), and has no particular uniqueness for use as building stone when compared to the material in the general area (Tr. 48, 68).

Contestant's next witness was Mr. Fred Potter. Mr. Potter holds a B.S. degree in geology from the New Mexico School of Mines (1976), and has completed 1 year of post graduate study in geology at New Mexico State University (Ex. 13). He has been employed by BLM since 1978 and is currently the Phoenix Resource Area Geologist. Id. As a part of his official duties, he has examined the Nita Jean Nos. 3 and 4 claims eight to ten times in the preceding 2 1/2 years (Tr. 83).

Mr. Potter's testimony concerning the characteristics of the stone on the claims was consistent with that of Mr. Walker.

He stated that the stone is a randomly fractured, friable schist with poor cleavage (Tr. 89); that it does not break cleanly, but fractures with feathered edges (Tr. 97); and that consequently it is difficult to lay in grout or concrete as building stone. Id.

Mr. Potter testified concerning the amount of similar stone in the area. He explained that the type of schist found on the claims is the original country rock in Central Arizona (Tr. 93). It extends to a depth of several thousand feet, and outcrops in an area of 50 square miles surrounding the claims. Id.

After visiting several randomly selected stone suppliers in the Phoenix area, Mr. Potter prepared Exhibit 15, a document entitled "Survey of the Market Potential for the Nita Jean Three and Four Type Rock." In general, the "survey" is more relevant to the question of marketability. It does, however, shed some light on the relative quality of the Nita Jean material. Mr. Potter took samples from several sites on the two claims to the selected suppliers. When offered in large tonnage lots, none of the suppliers were interested in purchasing the material (Tr. 96-99). Mr. Potter testified that one supplier, Mr. Whitey Webster of Garden Stone and Supply, estimated the value of the stone at "no more than \$ 30 per ton" (Tr. 98). He estimated mining costs at \$ 25 per ton and transportation costs at 12-15 cents per ton. Id. Based on his investigations, Mr. Potter gave the opinion that the Nita Jean stone has no unique feature that distinguishes it from any other common stone in the area (Tr. 101).

Contestees' first witness to give testimony relevant to the common variety issue was Dr. David E. Wahl, Jr. who holds a Ph.D. in geology from Arizona State University (Tr. 270). In preparation for this contest, he spent 4 days examining the Nita Jean Nos. 3 and 4 claims and their environs (Tr. 156). In addition, he has done some geology work in the past in the part of the Phoenix Mountains where the subject claims are located. Id.

The portion of Dr. Wahl's testimony pertaining to this issue was largely aimed at establishing the geologic nonuniformity of the stone in the Phoenix mountains (Tr. 188, 199; Exs. B, D). With specific reference to Nita Jean Nos. 3 and 4, Dr. Wahl explained that there are two main rock types present with variations in quality within each type (Tr. 171-176; Ex. B). He stated:

- a. The most prevalent rock on the claims is a "broken and friable" schist without "much building stone quality." (Tr. 171) (represented by the brown shading on Ex. B).
- b. The second most prevalent rock on the claims is also a form of schist, "a significant portion" of which can be "used for decorative facing stone for rock walls." (Tr. 174) (represented by the green shading on Ex. B).
- c. The northeast corner of Nita Jean No. 4 contains a "somewhat massive chloritic schist" body "that doesn't break into sheet-like slabs of rock very easily." The principle use of this stone would be "for landscape boulders and rubble rock," (Tr. 173) (represented by the blue shading on Ex. B).
- d. The northeast corner of Nita Jean No. 3 contains a small deposit of volcanic rock not susceptible to splitting into "any kind of conformable slabs to be used for building stone. It does produce some boulders that could be used for landscaping." (Tr. 173) (represented by the pink shading on Ex. B).
- e. What Dr. Wahl described as "possibly [the] most significant rock type on the claim" is a phyllite, "a rock that's similar to a schist except it's finer grained." The significance apparently lies in the "bronze colored surficial coating," or "desert varnish" caused by exposure to the atmosphere. (Tr. 174) (represented by the orange shading on Ex. B).

Dr. Wahl also testified concerning 21 rock samples admitted as Exhibits M-1 through M-19 (including M-3A and M-8A). In summary, this testimony showed that in and around the subject claims, there exist several different types of rock of variable quality for building stone purposes (Tr. 188-199). As he put it, "\* \* \* I just wanted to show that there are a variety of rock types in the Phoenix Mountains, and its a little bit unreasonable to call that area one type of stone \* \* \*." (Tr. 199)

The only other witness for the contestees to give testimony relevant to the common variety issue was Mr. Wayne Melluzzo, son of Frank and Wanita Melluzzo, and president of Melluzzo Stone Company, Inc. (Tr. 434). Wayne Melluzzo testified

that the stone on the subject claims currently sells for \$ 80 per ton F.O.B. the claims (Tr. 437, 593). His testimony concerning costs was incomplete. Although he stated some costs are incurred for the maintenance of his two offices and three vehicles (Tr. 597-99), he could not give a dollar figure (Tr. 604). He did state, however, that his labor cost is approximately \$ 10 per ton (Tr. 594).

### Analysis and Findings

To test a building stone deposit for distinct and special value, a comparison with other building stone deposits must be made. McClarty, 408 F.2d at 908. The comparison must show that the stone in question has a unique property giving the deposit special value. Id. If the stone is used in ways that ordinary kinds of building stone are used, the special value of the stone must be reflected by the potential for a greater profit to the miner. Id.

Contestant's evidence showed that, for use as building stone, the material on the subject claims is essentially indistinguishable from a very large quantity of geologically similar stone occurring in the Phoenix area. Contestant established that within the Phoenix mountains alone, there exist approximately 8.5 square miles of schist, the predominant type of stone found on the claims. The testimony of contestees' witness Dr. David Wahl was supportive of contestant's case. On cross-examination, Dr. Wahl conceded that within the Phoenix area, "there are large quantities of types of schist \* \* \*," and "hundreds of millions" of tons of phyllite (the second most prevalent rock type on the subject claims) (Tr. 373-379). In short, contestant clearly showed that the building stone deposits on Nita Jean No. 3 and No. 4 have no unique properties in comparison with a vast amount of substantially identical stone found in the area. Accordingly, contestant satisfied its burden of proof with regard to this issue.

Apparently realizing that schist and phyllite are abundant in the area, contestees attempted to distinguish the stone on the subject claims by pointing out its varied colorations. They failed, however, to establish that these colorations are unique. In fact, as the Department noted in a 1969 decision involving the same parties and immediately adjacent claims (Nita Jean and Nita Jean No. 2), "\* \* \* variety in coloration appears to [be] the common attribute of the vast amounts of decorative building stone which can be found in the Phoenix area and elsewhere in the State."

United States v. Frank and Wanita Melluzzo, 76 I.D. 181, 185 (1969). The rule of law with regard to coloration is clear:

Attractive coloration, even if unusual, does not distinguish a deposit of stone from other deposits of the same stone so as to justify the conclusion that the deposit has a distinct and special property, where comparable stone is abundant and is found with varied coloration. [Citations omitted.] This is because beauty of coloration is inherently subjective. One type of coloration from among the infinite variety of nature may appeal to some persons, and this coloration may in fact be unusual. However, the fact that one deposit of a material may bear this coloration does not make it unique, as there are often deposits which will do the same job to the full satisfaction of the other persons.

United States v. Dunbar Stone Co., 56 IBLA 61, 65 (1981).

In summary, the record shows that the only unique property claimed for the stone in question is its varied coloration. As the decisions have pointed out, however, such a characteristic does not amount to the "unique property" required under 30 U.S.C. § 611 where, as here, similar variably colored stone is abundantly available in the area. Accordingly, I determine that the material on Nita Jean No. 3 and on Nita Jean No. 4 is a common variety within the meaning of Section 3 of the Act of July 23, 1955.

#### PRE-JULY 23, 1955 DISCOVERY

##### Applicable Law

A mining claim can be valid only if supported by a discovery of a "valuable mineral deposit." By the Act of July 23, 1955, Congress determined that "common varieties" of certain minerals could not thereafter qualify as "valuable mineral deposits." Consequently, to sustain as valid a mining claim located prior to the Act of July 23, 1955, for a common variety mineral (as I have found the mineral on the claims at issue to be), the "prudent-man" and "marketability" tests for discovery must have been met by the date of the Act, Barrows v. Hickel, 447 F.2d 80, 82 (9th Cir. 1971); Palmer v. Dredge Corp., 398 F.2d 791, 795 (9th Cir. 1968), cert. denied, 393 U.S. 1066 (1969), and reasonably continuously thereafter. United States v. Martinez, 49 IBLA 360, 365 (1980); United States v. Taylor, 82 I.D. 68, 70 (1975).

These tests for discovery (*i.e.* "prudent man" and "marketability") although often stated separately, are "logical compliments" that can be combined in one statement. United States v. Coleman, 390 U.S. 599 (1968). For example, in Barrows, 447 F.2d at 83, the court stated: "What is required is that there be, at the time of discovery, a market for the discovered material that is sufficiently profitable to attract the efforts of a person of ordinary prudence."

A sufficiently profitable market can be shown in several ways. Actual sales from the claims, resulting in something more than marginal profits, can satisfy the tests. See Edwards v. Kleppe, 588 F.2d 671 (9th Cir. 1978). A lack of sales, however, is not necessarily fatal. The relevant inquiry focuses on the mineral itself - is there a sufficiently profitable market for that kind of mineral. Thus, if no sales have been made, or if the record of sales is somehow inadequate to prove marketability, the claimant can rely on the successful marketing efforts of others to satisfy the tests. Melluzzo v. Morton, 534 F.2d 860 (9th Cir. 1976). To do so, the claimant must show: (1) that others in the area have successfully marketed comparable material, (2) that his material is of a quality that could have met local demand, and (3) that considering all costs, his net profit could have been comparable to that of the successful claimants. Id. at 863. In other words, it must be shown that the successfully exploited market was available to the claimant, and that he could have extracted, prepared, and transported his material at a net profit sufficient to attract the efforts of a prudent person. See Verrue v. United States, 457 F.2d 1202 (9th Cir. 1972).

### Evidence

Mr. Gary Walker was the only witness for the contestant to give testimony relevant to the pre-1955 discovery issue. In addition to his qualifications discussed in the previous section, Mr. Walker served 9 years in the United States Air Force as a Photo Radar Interpreter (Tr. 14; Ex. 2). In that capacity, his duties essentially involved aerial photograph interpretation. Based on this experience, and on his examination of aerial photographs of the subject claims taken in 1954 and 1956, Mr. Walker testified that between January 1954 and February 1956 no material was removed from Nita Jean No. 3 or No. 4 (Tr. 58; Ex. 7, 8, 9). He concluded by stating that, in his opinion, no discovery of a valuable mineral deposit had been made on the subject claims prior to July 23, 1955 (Tr. 67).

Contestees presented three witnesses whose testimony bears on this issue. <sup>6/</sup> Mr. Marion J. Evertsen, a Phoenix mason contractor in the masonry business since 1947 (Tr. 551); Mr. Virgil Griner, a retired mason contractor who began masonry work in the Phoenix area in 1950 (Tr. 570); and Mr. George P. Fagen, a general contractor and builder who began his contracting business in Phoenix around 1945 (Tr. 685). Mr. Evertsen testified that he and his crew mined and put in place the decorative stone that now makes up the large front panel on the Motorola building in Phoenix (Tr. 552). He stated that he removed the stone "[s]omewhere in the neighborhood of 1955" *Id.*; that he did not know how much he removed (Tr. 554); and that, in his opinion, "there was a market for the type of building stone on this Melluzzo property in 1955." *Id.* On redirect examination, Mr. Evertsen clarified what he meant by "this Melluzzo property." By reference to Exhibit 9, he clearly pointed out that the stone was removed from two Melluzzo claims adjacent to the west of the claims now in contest (Tr. 566-68).

Mr. Virgil Griner testified that he went on the subject claims in 1954 or 1955 in search of decorative stone "of a mauve, greenish color" for use in the construction of the Paradise Valley Country Club in Phoenix (Tr. 573). Mr. Griner stated that he found the stone he wanted on Nita Jean No. 4, and subsequently purchased 75 tons of it from the Melluzzo Stone Company (Tr. 573-74). In response to the question, "[i]s it your opinion that there was a market for the type of stone" on the subject claims in 1955, Mr. Griner answered, "It was getting started" (Tr. 576).

Mr. George Fagen testified that in May or June of 1955 he purchased between 6 and 15 tons of stone from the subject claims for decorative use in his Ocotillo Hills subdivision (Tr. 687-89). He stated that in 1955 there was a market for building stone in the Phoenix area, and that the stone from the subject claims was competitive in that market (Tr. 690, 692).

---

<sup>6/</sup> A fourth witness, contestee Frank Melluzzo, also gave testimony relevant to the issue. As noted earlier, however, Mr. Melluzzo's testimony will be given little weight. Where I find that a particular part of his testimony has been corroborated, or is otherwise deserving of credence, I will so note.

## Analysis and Findings

Comparing two aerial photographs of the area covered by the claims, one taken in early 1954 and the other in early 1956, contestant's expert with regard to aerial photograph interpretation demonstrated that the surface of the subject claims had not been disturbed between 1954 and 1956. Standing alone, this evidence of lack of production is sufficient to establish a weak prima facie case on the issue of discovery prior to July 23, 1955. Melluzzo v. Morton, 534 F.2d 860, 863 (9th Cir. 1976); United States v. Frank and Wanita Melluzzo (Supp. on Judicial Remand), 32 IBLA 46, 50 (1977). Any question as to lack of strength of contestant's case was removed, however, by a statement of Frank Melluzzo made during the 1964 hearing resulting in United States v. Frank and Wanita Melluzzo, 76 I.D. 181 (1969); (Tr. 943-45). This Departmental decision summarized the lengthy statement by saying: "\* \* \* Melluzzo testified positively and flatly that he could not make a business of selling rocks from any one of his claims." Id. at 192. In other words, Mr. Melluzzo admitted that in 1955, he could not sell the stone from any single claim at a profit sufficient to attract the efforts of a person of ordinary prudence. The statement is a party-opponent admission excluded from the category of hearsay by Rule 801(d)(2)(A) of the Federal Rules of Evidence. Carlsen v. Javurek, 526 F.2d 202 (8th Cir. 1975); In re Kelly, 442 F.Supp. 525 (E.D. Va. 1978). It was made in reference to all of the claims held by Mr. Melluzzo in 1955. 76 I.D. at 191. Since the claims now in contest were located on April 4, 1955 (Exs. OO and PP), he was, by implication, referring to them as much as to any of his other claims.

It is important to note the reason why Mr. Melluzzo "could not make a business of selling rocks from any one of his claims." The argument could be made that he was merely referring to an economic fact - that as the level of production increases, the cost of producing each unit decreases. In other words, one could argue that what he meant was that he could make a business of selling rocks, but only if he could spread his start-up and operating costs over several of his claims. If all of those costs had to be absorbed by a one claim operation, then that claim could not turn a profit. If this is what Mr. Melluzzo had referred to, then the statement would not be evidence of lack of marketability. When several claims are operated as a group to lower per claim costs, Departmental decisions allow the economics of the group operation to be considered in the marketability equation for each claim. In Re Pacific Coast Molybdenum Co., 90 I.D. 352, (1983); See concurring opinion

of Judge Mullen in Cactus Mines Limited, 79 IBLA 20, 32-33 n.2 (1984). In other words, a claim is not invalid for lack of individual marketability if the claimant can show that by spreading operating costs over a group of claims, the per ton costs of production allow the mineral from each claim to be marketed at a profit.

The admission can, and will be used as evidence of lack of marketability, however, because I find Mr. Melluzzo was not referring to costs but to demand. The reason he "could not make a business of selling rock from any one of his claims" is that the 1955 market demand for building stone was negligible in the Phoenix Area. The volume of sales of any one kind of stone (i.e., from any one claim) was insufficient to "make a business," but by stocking several different kinds and colors from his numerous claims, Mr. Melluzzo assertedly turned a profit. He explained the situation by analogizing to another kind of business: "You have a grocery store, and you have canned milk, and you have baby food. You might be all right for people that want canned milk and baby food, but I will guarantee you too many people aren't going to buy from your store \* \* \*." 76 I.D. at 191, quoting from Tr. 1515-1519. In other words, the meager returns that could be realized from the occasional sales of one kind or color of stone from one claim were not enough "to make a business." Mr. Melluzzo's admission does not by itself go so far as to prove the lack of marketability of the claims he held in 1955, but it does provide strong corroboration for contestant's assertion that there was no discovery on either of the subject claims before July 23, 1955. Combining the admission with the evidence discussed above establishes a strong prima facie case.

In attempted rebuttal, contestees could produce no receipts or records of pre-July 23, 1955 sales or costs associated with the subject claims. The only reliable evidence of any production came in the form of the testimony of Virgil Griner and George Fagen. Taken together, their testimony showed that 6 to 15 tons of stone was sold from the subject claims before the effective date of the 1955 Act, and about 75 additional tons were sold sometime during 1954 or 1955. Neither of the witnesses could positively say how much he paid for the stone. Furthermore, there was no reliable evidence concerning the costs associated with this production. Contestees presented evidence indicating that some stone from Nita Jean Nos. 3 and 4 was marketed before July 23, 1955, but they completely failed to show that it was marketed at any profit.

Inadequate evidence of production from a particular claim would not be basis for invalidation if there were other evidence sufficient to prove the marketability of the mineral. Verrue v. United States, 457 F.2d at 1204. In this case, there was some other evidence relating to marketability. One of contestees' witnesses gave his opinion that, in the Phoenix Area, there was "a market" for building stone in 1955, and that the stone from the subject claims was competitive in that market. Another witness stated that the market "was getting started." These bare assertions, however, fall far short of establishing marketability of the stone. Evidence suggesting the existence of "a market" for the kind of stone on Nita Jean No. 3 and No. 4 is immaterial without proof that the market could have sustained a mining operation sufficiently profitable to attract the efforts of a person of ordinary prudence.

In summary, the evidence of production from the subject claims failed to show that the stone was marketable at a profit by July 23, 1955. The only other evidence pertaining to marketability had similar shortcomings. Accordingly, I find that prior to and as of July 23, 1955: (1) no market existed for the materials on Nita Jean No. 3 or on Nita Jean No. 4 that was sufficiently profitable to attract the efforts of a person of ordinary prudence; therefore, (2) the mineral deposits on Nita Jean No. 3 and No. 4 was not "valuable" within the meaning of the mining laws (see 30 U.S.C. § 22).

### CONCLUSION

Because the stone on Nita Jean No. 3 and on Nita Jean No. 4 is a "common variety," its status as a "valuable mineral deposit" had to exist as of July 23, 1955 (assuming it existed at all), in order for the claims, or either of them, to be valid. Because it did not, I am constrained to hold that the Nita Jean No. 3 and No. 4 placer mining claims are invalid. This holding renders discussion of the other charges in the complaint unnecessary. See United States v. Anderson, 15 IBLA 123 (1974).

---

Harvey C. Sweitzer  
Administrative Law Judge