

UNITED STATES

v.

HIRAM B. WEBB

IBLA 91-458

Decided March 17, 1995

Appeal from a decision of Administrative Law Judge Ramon M. Child declaring placer and lode mining claims null and void. A-6390-1.

Affirmed as modified.

1. Administrative Authority: Estoppel—Estoppel—Mining Claims: Generally

A claim of estoppel against the United States will be rejected where there is no showing of affirmative misconduct in the nature of an erroneous statement of fact in an official written decision or where the effect of allowing estoppel would be to grant a right not authorized by law.

2. Federal Land Policy and Management Act of 1976: Assessment Work—Mining Claims: Assessment Work

Compliance with sec. 314(a) of FLPMA, 43 U.S.C. § 1744(a) (1988), is accomplished by the annual filing of a copy of either proof of assessment work performed or a notice of intention to hold the mining claim. Compliance with the requirements of the assessment statute, 30 U.S.C. § 28 (1988), is accomplished only by the actual performance of the assessment work or by obtaining a deferment of the assessment work. Compliance with one of the foregoing statutes does not constitute compliance with the other.

3. Mining Claims: Location—Mining Claims: Placer Claims

In order to satisfy the requirements for a placer location where the location is not made by legal subdivisions in conformity to a survey, the location must be distinctly marked on the ground so that

its boundaries can be readily traced and the claim's location notice must include a description of the claim tied to a natural object or permanent monument sufficient to identify the claim. While a locator need not submit a precise description of the position of the claim, the description must generally be adequate to enable the claim to be found and identified by following the recorded description. Where the claimant contends that the actual situs of the claim on the ground differs from the recorded description, the claimant has the burden of showing that the claim was properly located at the position asserted.

4. Federal Land Policy and Management Act of 1976: Recordation of Mining Claim Certificates or Notices of Location—Mining Claims: Location—Mining Claims: Placer Claims—Mining Claims: Possessory Right

While the provisions of 30 U.S.C. § 38 (1988) permit an individual who has held and worked a claim, as provided therein, to assert a location without the necessity of proving local recording and posting, such a claim must still be timely recorded with BLM in accordance with the recordation provisions of sec. 14 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1988), and where the claim has not been duly recorded, it is a nullity. Where placer rights are alleged under 30 U.S.C. § 38 (1988), such rights must be based on an asserted placer location. Placer rights do not, through the working of this statute, ever attach to a lode location.

5. Mining Claims: Common Varieties of Minerals: Generally—Mining Claims: Determination of Validity—Mining Claims: Discovery: Generally—Mining Claims: Placer Claims—Mining Claims: Possessory Right

A placer mining claim for a common variety mineral is properly declared null and void where the mining claimant relies on 30 U.S.C. § 38 (1988) but fails to affirmatively show that he held and worked the claim for the requisite period of time prior to the July 23, 1955, effective date of the Common Varieties Act, 30 U.S.C. § 611 (1988).

APPEARANCES: Hale C. Tognoni, Esq., Phoenix, Arizona, for Hiram B. Webb; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Hiram B. Webb ^{1/} has appealed from a decision of Administrative Law Judge Ramon M. Child, dated August 13, 1991, declaring null and void the Turkey Track No. 2 placer and the Turkey Track Nos. 4, 7, and 8 lode mining claims situated in the NE¹/₄ sec. 21 and the W¹/₂ sec. 22, T. 4 N., R. 3 E., Gila and Salt River Meridian (G&SR), Maricopa County, Arizona, in an area known as the Union Hills, just within the northern corporate limits of Phoenix, Arizona. The Turkey Track No. 2 placer claim was purportedly located by Robert Shifflet on September 1, 1954; the Turkey Track No. 4 lode claim was located by Webb on April 13, 1956, and amended on February 14, 1961; and both of the Turkey Track No. 7 and No. 8 lode claims were located by Webb on April 16, 1960, and amended on August 14, 1960.

The lands included in the claims at issue have not always been open to mineral entry. On August 13, 1956, BLM issued Small Tract Classification Order No. 52, which classified, *inter alia*, the E¹/₂ sec. 21 and the W¹/₂ sec. 22, T. 4 N., R. 3 E., G&SR, as suitable for lease and sale for residential purposes under the Small Tract Act of June 1, 1938, as amended, 43 U.S.C. § 682a (1976) (repealed by section 702 of the Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, 90 Stat. 2787 (1976)). The order noted that the classification of the described lands segregated them from all forms of appropriation, "including locations under the min-ing laws." On May 16, 1958, Small Tract Classification Order No. 52 was revoked to the extent it covered the E¹/₂ sec. 21, and on September 17,

^{1/} On appeal, Webb has filed a motion requesting that Turkey Track Min-ing, Inc., be added as an additional party to this appeal on the ground that Turkey Track Mining's purchase of the claims at issue, pursuant to a Nov. 3, 1990, agreement, renders it the real party in interest in this matter. Turkey Track Mining, as Webb's lessee under a May 15, 1985, min-ing lease and purchase option (Exh. C-18), was named as a party in the contest complaint originally filed in this matter and, although properly served with the complaint, chose not to answer the contest charges. Therefore, by decision dated Nov. 30, 1989, BLM declared the contested mining claims null and void as to the interest held by Turkey Track Mining. See, e.g., *United States v. Soren*, 47 IBLA 226, 227 (1980). Turkey Track Mining did not appeal BLM's decision which then became final. Since Turkey Track Mining's interest in the challenged claims has been voided by a final Departmental decision, we deny Webb's request to add Turkey Track Mining as an additional party to this appeal. Webb has also filed a motion to confirm his and Turkey Track Mining's right to possession of the claims pending appeal. Our resolution of his appeal, however, effectively moots both Webb's motion and BLM's request that the motion be stricken from the record.

1958, the order was revoked as to the NW¹/₄ and the W¹/₂ SW¹/₄ sec. 22. The order was cancelled on June 14, 1965, thereby releasing the E¹/₂ SW¹/₄ sec. 22 from the segregative effects of the small tract classification. However, in 1971, the City of Phoenix filed an application (A 6390) under the Recreation and Public Purposes Act (R&PP Act), 43 U.S.C. § 869 (1988), seeking all Federal land in secs. 21, 22, and 27, T. 4 N., R. 3 E., G&SR, and those lands were again segregated from mineral entry on April 26, 1973, when BLM approved the City's application.

On May 9, 1989, BLM initiated contest proceedings seeking to have the Turkey Track No. 2 placer and Turkey Track Nos. 4, 7, and 8 lode mining claims declared null and void. The contest complaint charged that:

- a. Minerals have not been found in sufficient quantity and quality within the limits of the Turkey Track No. 2 placer, Turkey Track Nos. 4, 7, and 8 lode claims to support the discovery of a valuable mineral deposit within the meaning of the mining laws[.]
- b. The material being mined within the limits of the Turkey Track No. 2 placer claim is not a valuable mineral deposit as defined under Section 3 of the Act of July 23, 1955[, 30 U.S.C. § 611 (1988);]
- c. The Turkey Track No. 2 placer claim contains material which is principally valuable for use as fill, sub-base, ballast, riprap, and barrow, for which ordinary earth or rock may be used. The material is not locatable under the mining laws and was not locatable prior to July 23, 1955[.]
- d. The claimant failed to substantially comply with the requirements for annual assessment work on the Turkey Track No. 2 placer, Turkey Track Nos. 4, 7, and 8 lode claims as required by statute 30 U.S.C. 28[.]
- e. The claimant failed to substantially comply with the requirements of discovery and holding and working the Turkey Track No. 2 placer, Turkey Track Nos. 4, 7, and 8 lode claims as required by statute 30 U.S.C. 38[; and]
- f. The claimant failed to comply with the provisions of 43 U.S.C. 1744 and 30 U.S.C. 38 by attempting to acquire placer rights through recording, holding and working the Turkey Track Nos. 4, 7, and 8 lode claims.

(Contest Complaint, Paragraph 5). BLM also contended that the eastern 1,320 feet of the Turkey Track Nos. 7 and 8 lode mining claims, which were situated within the E¹/₂ SW¹/₄ sec. 22, were null and void ab initio because, when these claims were located in 1960, that land was segregated from mineral entry by Small Tract Classification Order No. 52.

Webb duly filed an answer, denying the substantive allegations of the complaint. He asserted that the four contested claims, which he characterized as granite placer claims comprising an integral part of 16 granite placer claims (collectively identified as the "Turkey Track Granite Quarries"), contained a commercially valuable mineral deposit, which constituted a valid discovery within the meaning of the mining laws. Webb requested a hearing both on the Government's allegations and additional matters which he raised in his answer.

A hearing was held before then Chief Administrative Law Judge Parlen L. McKenna on April 23, 24, and 25, and May 9 and 10, 1990, in Phoenix, Arizona. The hearing focussed on the issues raised in the con-test complaint, including the effect of the various withdrawals from mineral entry of the lands embraced by the claims on the validity of those claims, and two additional issues advanced by Webb, viz., whether the Government was estopped by its actions since 1957 from challenging the validity of the claims and whether Webb had sufficiently complied with the requirements of holding and working the claims, within the meaning of 30 U.S.C. § 38 (1988), so as to obviate the necessity of proving valid placer locations. We believe that, for purposes of providing an overview, it is useful at the outset to briefly review the relevant testimony adduced at the hearing.

BLM elicited the testimony of 7 witnesses. The first witness was Larry Paul Bauer, Deputy BLM State Director for Mineral Resources, who analyzed three aerial photographs of the area taken in 1954, 1958, and 1964, respectively, and, based on his interpretations, identified the sites where mining activities were occurring as of various dates. Bauer concluded that, while no surface mining activity appeared to be occurring on the claims in question either in 1954 or 1958, by 1964 there was evidence of the development of a surface mine within the area asserted to be included within the Turkey Track No. 2 placer claim (Tr. 29-30).

Harvey W. Smith, a consulting mining engineer who had performed a mineral survey of a number of mining claims for Webb in 1961, also testified for the Government. He noted that, even though he completely traversed the area in which contestee now asserts the Turkey Track No. 2 placer claim was situated in the course of completing his mineral survey, he never saw a claim corner, discovery monument, or any other indicia of this claim's existence, nor did he recollect Webb ever mentioning the existence of a placer claim (the Turkey Track No. 2) which generally overlapped one of the lode claims (the Turkey Track No. 3) which Smith was surveying in conjunction with a patent application on which Webb had filed (Tr. 66-67, 184).

A number of the witnesses called by the Government testified as to the nature of the market for granite as of the critical times and of historic

use of the Union Hills area. Thus, Larry Eugene Walker, an employee of Sun State Rock and Material, the sublessee of the Turkey Track No. 2 placer claim, discussed the uses of the granite mined from the claim and the economics of mining the claim; Bertram L. Snyder, a retired doctor, related his observations of mining activities in the area over the past 40 years; and Harry T. Nichols, the son of the owner of claims in the area since the late 1940's, discussed mining operations in the Union Hills area in the late 1940's and early 1950's.

Finally, BLM presented the testimony of Clyde Murray, the BLM geologist assigned to examine the claims at issue. ^{2/} Murray first discussed the evidence which he was able to compile from a review of various documentary submissions with respect to the claims at issue both in the County Recorder and BLM offices. He noted that, based on the original location notice for the Turkey Track No. 2 placer claim, filed by Shifflet, it was impossible to definitively locate the claim since no cardinal directions were provided between the claim corners. Because of this deficiency, the claim could, based on the location notice, be situated anywhere within a large circle shown on exhibit A-33M (Tr. 232). ^{3/} He further testified, however, that, regardless of where in the identified circle the Turkey Track No. 2 claim was positioned, it was not possible for this claim to overlap the Turkey Track No. 3 lode claim, as contestee contended, since that latter claim lay considerably outside the circle delineated (Tr. 232-33, 236).

Insofar as the Turkey Track No. 3 was concerned, Murray noted that it had been located in 1954 as a lode claim and was acquired by Webb in 1956 (Tr. 258). Thereafter, on August 11, 1964, Webb filed a mineral patent application (AR 034090) for this claim based on a purported discovery of valuable deposits of gold-bearing quartz along a vein on which Webb asserted he had done "considerable digging" (Exh. A-19A at 69). A contest was filed against this application and another patent application which had been filed by Webb (AR 032789) covering six additional lode claims, and the

^{2/} Chester Gawin, a BLM engineering technician, had previously described the drafting of the various overlays and the process by which the various claims were related to the underlying photographs. As he explained it, the primary basis for orientation of the claims was the Harvey Smith mineral survey. See Tr. 221.

^{3/} We note that it was the Government's contention that the absence of a call to a point of beginning from the initial starting point at the quarter corner between secs. 22 and 27 (delineated in the location notice as the "1/2 sec. marker in the south Sec. line of Sec. 22 T. 4 N., R. 3 E.") indicated that the claim, itself, commenced at the quarter corner, which would necessarily locate this claim considerably southeast of the location of this claim as shown on contestee's various maps. Contestee's speculations as to the starting point for this claim description are discussed infra.

claims involved were ultimately held to be null and void and the patent applications were rejected. ^{4/} Murray pointed out, however, that, in the patent application which contestee had filed, all of the values of the improvements found within the Turkey Track No. 3 (which would be the improvements now claimed to be within the Turkey Track No. 2 placer claim) were allocated to the lode claim. ^{5/} See Tr. 238-40.

Turning to the Turkey Track Nos. 7 and 8, Murray related that his research had discovered the existence of a number of previous claims located in the area between the Alta Vista No. 1 and the Turkey Track No. 1. According to Murray, this area first was included within the Black Hawk Nos. 1 and 2, located in 1954 and subsequently invalidated in a contest hearing in 1956, and thereafter was included within the Alta Vista Nos. 3 and 4, located in 1956 (Tr. 248-50). Later, in 1960, Webb located the Turkey Track Nos. 7 and 8 within the same area between the Alta Vista No. 1 and the Turkey Track No. 1. Murray noted that, in 1960 when the Turkey Track Nos. 7 and 8 were located, none of the land embraced by the claims, except for the western 180 feet in each claim, was open to mineral entry (Tr. 263).

With respect to the Turkey Track No. 4 lode claim, Murray pointed out that, as originally described in the 1956 location notice, the claim corners did not close. See Exh. A-25. Murray noted that an amended notice of location was filed in 1961, apparently following the description for the claim as delineated in the Harvey Smith survey of that claim (Tr. 262-63).

Murray then discussed his on-the-ground examination of the claims. He noted that since the Turkey Track Nos. 4, 7, and 8 were located as lode claims, he attempted to locate veins and mineralized structures which might contain values in lode form. He took samples from the Turkey Track Nos. 4 and 8, but the values for gold and silver which he obtained were "negligible" (Tr. 268). He took no samples on the Turkey Track No. 7 since he was unable to find any outcrops of quartz or other mineralized structures (Tr. 268-69). He subsequently opined that none of these claims were supported by a discovery of a valuable mineral deposit within their limits (Tr. 278).

Murray further testified that, in investigating the Turkey Track No. 2 placer claim, he did not examine land within the area circumscribed by the circle on exhibit A-33M, but rather examined the area around the Turkey Track No. 3 lode claim since this was the area which appellant now contended was embraced by the Turkey Track No. 2 placer location. He testified that the granite which he saw on the claim was a common variety

^{4/} For an abbreviated account of the history of the litigation surrounding this claim, see generally, Hiram Webb, 105 IBLA 290, 293-94 n.4, 95 I.D. 242 (1988).

^{5/} In this regard, Murray noted that assertions made in a 1979 filing by Webb indicating that the Turkey Track No. 3 had been located and amended as a placer claim (see Exh. A-17) were simply erroneous.

granite, similar to numerous other deposits within the general Phoenix area and possessing no distinct or special values for the uses to which it was put (Tr. 271-77). Murray declared that, based on his examination, the granite found on the claim was principally valued for fill, sub-base, ballast, rip-rap and barrow and, as such, was not locatable under the mining laws even prior to the adoption of section 3 of the Surface Resources Act in 1955. He concluded that this claim was accordingly null and void since it was not supported by the discovery of a valuable mineral deposit (Tr. 279).

In response, contestee presented the testimony of 12 witnesses. The first witness called was Hiram Webb, who testified both as to his involvement in granite production over a period of 40 years and his association with the Turkey Track claims. Webb related that he commenced his involvement in the sale of granite after the Second World War. His initial production was from a site on Washington Street in Phoenix (Tr. 363-64). Webb testified that in the late 1940's he made a few purchases of granite from the area of the Turkey Track claims but it was not until 1953 or 1954, upon the sale of his Washington Street site, that he purchased some of the Turkey Track claims from J.D. Landriault (Tr. 368-74). He subsequently purchased a number of claims from O.B. Richardson, including Turkey Track Nos. 7 and 8 (Tr. 385).

Webb testified that, while he generally sold the hard granite which required blasting from the pit on the Turkey Track No. 1, he took the soft, decomposed granite from any place where it was accessible, including the Turkey Track Nos. 2 and 4 (Tr. 374-78). Webb noted, however, that the granite on the Turkey Track Nos. 7 and 8 was not decomposed granite but rather solid rock (Tr. 379). He stated that, after he sold the Turkey Track No. 1 to Charles Myers, sometime around 1957, he moved his operation onto the Turkey Track No. 2 where he had a screening plant (Tr. 381). Webb noted that he had sold granite to numerous individuals in the Phoenix area over the years, though he was unable to specify when and from what claim any specific granite had been supplied (Tr. 383-90).

A series of witnesses who had had business dealings with Webb at the Turkey Track site was also called. Included in this group were Charles Myers, a retired granite business operator, who purchased the Turkey Track No. 1 from Webb in 1960 and subsequently sold it back to him. Myers stated that the first time he heard of the Turkey Track granite deposit was in 1954 when Webb went out there (Tr. 426). He noted that, by the time he acquired the Turkey Track No. 1 in 1960, the decomposed granite was pretty much gone from the claim, so he was producing crushed granite (Tr. 429). Myers stated that, while there was a crusher on the claim when he purchased it, he, Myers, installed a hot mix plant on the claim (Tr. 431). Myers testified that the granite from the Turkey Track No. 1 met the requirements for floor fill and for asphalt and Portland cement (Tr. 432, 438). While he had signed an affidavit in 1985 specifically attesting to the fact that, over the years, he had seen Webb operating on the Turkey Track Nos. 2, 3, 4, 7, and 8 claims, among others (see Exh. C-4 at 2), Myers subsequently

clarified this by explaining that he never knew where any of the claims were (with the exception of the Turkey Track No. 1) but had merely intended to indicate that he had seen Webb operating throughout the general area (Tr. 442).

Later in the hearing, appellant presented the testimony of Marlyn Augustine, James M. Krumtum, and Guy Stillman, all former customers of Webb. Augustine, a former real estate developer, testified that Webb had supplied him with granite from the Turkey Track claims for about 15 years, between 1954 and 1970 (Tr. 717).

Krumtum, a semi-retired engineering paving contractor, noted that he had first met Webb in 1947 when he was operating at the Washington Street site and became acquainted with the Turkey Track property sometime in the 1950's (Tr. 591). After describing his extensive construction activities in the Phoenix area in the 1950's, Krumtum identified an area on the Turkey Track No. 1 as containing one of the first pits from which he obtained granite commencing in the mid to late 1950's (Tr. 595, 610). ^{6/} He explained, however, that, while he obtained granite from a number of different sites, he never knew which claim any site was on. He noted that he had removed some landscaping rock from the northern area of the claims (indicating, on Exh. C-13, the Leo No. 3). He also indicated that he obtained granite from sites on the east side of the mountain in the area of the Alta Vista No. 1 and a number of sites on the west side of the mountain, including one site which would be near the western endline of the Turkey Track No. 2 where it is now alleged to exist. See Tr. 597-99; Exh. C-13. On cross-examination, Krumtum admitted that much of the material he removed was used for sub-base for which, in the 1950's, Krumtum noted "you could use about anything" (Tr. 612).

Stillman, an industrial engineer in the ranching and farming business, related his past business dealings with Webb. Stillman noted that Webb hauled granite from the Turkey Track claims for use as a subgrade fill at an implement dealership which Stillman owned in 1951 through 1954 (Tr. 622). ^{7/} He subsequently purchased additional granite for use around his home and testified as to similar such purchases by other individuals which

^{6/} While there appears to have been some controversy in the record as to the area that Krumtum was identifying as the situs of these removals (see Tr. 595), his subsequent identification of the site as containing a hot plant clearly locates it in the Turkey Track No. 1 claim since Myers had earlier testified that there was no hot mix plant on the claims until he built one on the No. 1 claim. See Tr. 431.

^{7/} It is likely that Stillman's recollection of the date of these events is in error, at least insofar as the years 1951 and 1952 are concerned. Stillman testified that Webb was living in a shack on the Turkey Track claims at that time (Tr. 626). Webb, however, had testified that he did not purchase the claims until 1953 or 1954 (Tr. 373).

he knew about (Tr. 623-24). Stillman stated that he saw Webb operating on sites within the Turkey Track Nos. 1 and 2, the Alta Vista and eventually the Leo (Tr. 627, 635-36). While he agreed with that any material could be used for subgrade, he also opined that the granite from the Turkey Track claims compacted very well and all that one needed to do to provide a satisfactory surface was apply a single coat of oil on the top (Tr. 629-30).

Patsy Brings, a former business associate of Webb, was the subject of a brief, telephonic examination in which she explained the compilation of exhibit C-3 from receipts she had obtained from Webb. She noted that Webb had informed her that all of the receipts related to sales from the Turkey Track claims, though he had not told her which claims the materials had come from (Tr. 452).

Contestee also presented the testimony of Jeffrey Lynn Andrews, an aerial photography interpreter, who analyzed the 1954, 1958, and 1964 aerial photographs for evidence of mining on the claims. In particular, Andrews stated that, as he interpreted the 1954 photograph, there were a number of areas of surface disturbance which were not identified as such by Bauer. See Tr. 464-72; Exh. C-7. Andrews admitted that vegetation was growing in all of these areas which he had identified, but he felt that the existence of such vegetation was not preclusive of the conduct of surface mining activities (Tr. 471-72). He also expressed his opinion that a significant precipitation event could have the effect of covering up indications of surface mining and make photographic interpretation less reliable (Tr. 475-76).

Contestee next examined Fred Potter, a BLM employee, with respect to various statements which he had assertedly made to Webb's lessee, Bruce Balls, concerning the legal status of the mining claims and the ramifications of BLM's approval of notices of intent and mining plans of operations for the Turkey Track No. 2 placer claim. As Potter related, he had informed Balls in May 1985 that none of the four claims had been challenged (Tr. 496-97). While admitting that two notices of intent and one mining plan of operation had been submitted for the claims, he noted that BLM does not approve notices of intent and that approval of a mining plan of operations does not imply any finding that the claims involved are valid, since, absent affirmative evidence to the contrary, the validity of a mining claim is assumed for purposes of approving plans of operation (Tr. 504-05, 510).

Brian Tognoni, a mineral land consultant, testified as to the drafting of various maps submitted by appellant as exhibits. See, e.g., Exhs. C-1, C-13. Tognoni noted that, in drafting the maps, he tried to rely on the Harvey Smith mineral survey for those claims which were the subject of that survey and on the claim location notices for other claims (Tr. 538). 8/ In

8/ An error, however, was apparently made in the positioning of the Turkey Track Nos. 7 and 8 claims on contestee's maps. Thus, Exhibits C-1 and C-13 show the Turkey Track No. 7 as north of the Turkey Track No. 8, in contrast

discussing the Turkey Track No. 2 placer claim, Tognoni adverted to a fold in the recorded notice of location, which, he suggested, would have contained the initial call for the claim (Tr. 547-48). He situated the Turkey Track No. 2 claim based on an interview with Webb and an old map which Webb gave him which purportedly outlines the Turkey Track No. 2 with dotted lines. See Tr. 539-40; Exh. C-11. Tognoni admitted, however, that even though he had traversed the claims a number of times, he never discovered any monuments on the ground for the Turkey Track No. 2 placer claim (Tr. 574).

Earl Runte, a consulting real estate appraiser hired by Webb and Balls to conduct a validity examination of the claims, elaborated on a report which he wrote concluding that the claims were valid and as to various discussions he had had with Potter concerning permissible activities on the claims (Tr. 644-84). The report which he prepared (Exh. C-16) concluded, based on interviews with a number of individuals, that "during the period following World War II through the late 1950's there was continuous production and sale of decomposed granite, granite boulders, some crushed granite and granite fines from the Turkey Track Claims, including but not limited to, Minnie, Turkey Track #1 through #8, the Alta Vistas and Leos" (Exh. C-16 at 11). See also Tr. 756-57. Runte admitted that his conclusion was based solely on this analysis of these interviews since he, himself, did not move to Arizona until 1958 (Tr. 770).

After presenting the testimony of Hiram B. Webb, Jr., Webb's son, which generally recounted activities on the claim from 1953 to 1957 (Tr. 686-706), the contestee called Bruce Balls, who was a principal in Turkey Track Mining, Inc., the lessee of the Turkey Track No. 2 placer mining claim at the time of the hearing. Balls stated that, in conversations with BLM personnel in 1985 prior to entering into the lease/option arrangement with Webb, Balls was informed that the Turkey Track Nos. 2, 4, 7, and 8 had never been contested in the past and were not then under contest (Tr. 801). He also discussed the preparation and subsequent approval of a mining plan of operations (Tr. 815-17) as well as the subsequent issuance by BLM of a notice of trespass and the consequences which ensued therefrom (Tr. 818-21). Under cross-examination, however, Balls admitted that he had received a letter from BLM in 1985 specifically advising him of the possible necessity of contesting the four claims (Exh. A-45 at 1) and a further document in 1986 specifically advising him that removal of common variety stone from either the Turkey Track Nos. 7 or 8 lode claims would be considered a trespass (Exh. A-45 at 5). See Tr. 826-31. Balls asserted

fn. 8 (continued)

to the Government depiction of the Turkey Track No. 8 as north of the Turkey Track No. 7. In this regard, the Government placement is clearly correct since the location notice for the Turkey Track No. 8 places the SE corner of that claim at a point coincident with the NE corner of the Turkey Track No. 7. See Exh. A-18 at 8.

that his understanding was that if they could show adverse possession for 5 years prior to 1955 it did not matter whether the claim was lode or placer (Tr. 831).

On completion of the contestee's case, BLM briefly recalled Bauer and Murray. Bauer stated that he had reexamined the areas which Andrews had indicated he believed showed evidence of surface disturbances but had come to the same conclusion as before, viz., no mining had occurred in those areas prior to the date of the photograph (Tr. 840-44). Murray testified as to problems associated with determining the date of preparation of contestee's exhibit C-11, the Webb map. With the completion of Murray's testimony, the hearing ended. Thereafter, both parties submitted voluminous post-hearing proposed findings of fact, conclusions of law, and supporting memoranda.

On August 13, 1991, Judge Child, who had been assigned the case after Judge McKenna became unavailable to decide the matter, issued his decision declaring the claims null and void. After briefly outlining the evidentiary burdens of the parties, he addressed each of the issues raised in the contest. Judge Child rejected Webb's contention that the detrimental reliance which Webb claimed he and his lessees had placed on BLM's toleration of the mining claims and failure to contest them over the past 40 years estopped BLM from challenging the validity of the mining claims at issue. In so doing, the Judge held that, since the Government retained ownership of the land embraced by a mining claim until the claim's validity had been confirmed by the issuance of a patent, delays in instituting contest actions did not prevent the Government from asserting its rights to those public lands. He further found that the evidence contradicted Webb's professed detrimental reliance, specifically concluding that no BLM employee had made any representations justifying an assumption that Webb would prevail if a contest were initiated or that a patent would issue if one were sought. Judge Child noted that estoppel would not lie even if such representations had been made because claims of estoppel against the Government must be predicated on crucial misstatements in official decisions, not erroneous oral advice.

Judge Child next analyzed whether each claim met the requirements for proper location and whether each had been duly recorded. According to the Judge, the Turkey Track No. 2 placer mining claim, as described in its September 1, 1954, location notice, encompassed an area 1,500 feet by 600 feet with one corner tied to the one-half section marker in the south section line of sec. 22, T. 4 N., R. 3 E., but, because of the complete absence of cardinal directions in the description, was incapable of precise delineation. He determined, however, that there was no probative evidence placing the claim on the ground either in the general vicinity of the described location or at the site now claimed by Webb, i.e., generally overlapping the Turkey Track No. 3 lode mining claim.

Judge Child concluded that the location notice for the Turkey Track No. 2 placer claim was fatally deficient since the claim could not be

located by following the recorded description, observing that, although there may have been a fold in the original location notice, ^{9/} the evidence failed to establish either that the fold concealed any writing or what the substance of the alleged missing information might be. He also noted that Shifflet's apparent failure to monument the claim on the ground or attach a map, plat, or sketch of the claim to the claim location notice constituted an abandonment of the claim under Arizona law, citing Arizona Revised Statutes (ARS) § 27-203(E). None of Webb's evidence, the Judge ruled, sufficed to overcome BLM's prima facie case that Shifflet had not properly located the Turkey Track No. 2 placer claim and had abandoned that claim.

Judge Child discerned no flaws in the initial location of the Turkey Track No. 4 lode mining claim. He concluded that the claim had been properly located on April 13, 1956, prior to the August 13, 1956, withdrawal of the land from mineral entry by Small Tract Classification Order No. 52.

Turning to the Turkey Track Nos. 7 and 8 lode mining claims, Judge Child found that the east 1,320 feet of the Turkey Track No. 7 lode mining claim located by Webb on April 16, 1960, and amended on August 14, 1960, was situated in the W $\frac{1}{2}$ of sec. 22, as stated in the original location notice, which was, at the time the claim was located, withdrawn from mineral entry by Small Tract Classification Order No. 52. The Judge accordingly held that the location notice was valid only as to the west 180 feet of the claim (which Judge Child asserted was located in the E $\frac{1}{2}$ sec. 21) and was null and void ab initio as to the east 1,320 feet of the claim. He similarly concluded that the Turkey Track No. 8 lode mining claim, located contemporaneously with the Turkey Track No. 7 lode claim, was null and void ab initio to the extent it included land within sec. 22, determining that the claim was validly located only to the extent it embraced the west 180 feet of the claim and a small slice of the claim located along its north boundary, which Judge Child contended was not within sec. 22.

According to Judge Child, the lack of filed affidavits of labor or indications on the ground that required assessment work related to placer claims had been conducted was sufficient to establish a prima facie case that the annual assessment work mandated by 30 U.S.C. § 28 (1988) had not been performed on the claims. Nevertheless, the Judge ruled that Webb had satisfied his burden of overcoming BLM's case by establishing that he had complied with the mining claim recordation requirements by the 1979 recording of the claims under 43 U.S.C. § 1744(b) (1988) and by thereafter making the required annual filings. Moreover, while noting that the evidence

^{9/} It was appellant's contention that an examination of the location notice filed for the Turkey Track No. 2 which had been filed with the county recorder (see Exh. A-1) showed that it contained a fold which, Webb surmised, obscured an initial call which would have resulted in the location of the claim at the situs asserted by Webb.

established that such assessment work as was performed was for the benefit of lode claims, Judge Child nonetheless concluded that contestant did not meet its burden of proof on this issue.

Judge Child next addressed the question of whether Webb had met the holding and working requirements of 30 U.S.C. § 38 (1988) on any of the claims at issue, thus obviating the need to prove that the claims had been properly located. That statute, he noted, relieved claimants who established that they and their grantors had held and worked their claims for the period prescribed by the statute of limitations for mining claims of the State where the claims were situated of the necessity of demonstrating that the claims were validly located, although it did not dispense with the requirement that the claims be supported by the discovery of a valuable mineral deposit. ^{10/}

After declaring that the 10-year statute of limitations found at ARS § 12-526(A) applied, the Judge reviewed the evidence introduced at the hearing pertaining to Webb's holding and working of each of the four individual claims at issue, specifically repudiating Webb's attempt to group these and other claims together as the Turkey Track Mine or Turkey Track Granite Quarries. According to Judge Child, the testimony established that, while the majority of the granite removed from the Turkey Track area came from the Turkey Track No. 1 claim, material had also been extracted on occasion from the Turkey Track No. 2 placer and the Turkey Track Nos. 4, 7, and 8 lode claims. He found the evidence insufficient, however, to pinpoint exactly when and over what period of time each claim had been worked. Judge Child concluded that Webb's failure to prove that he had held and worked each individual contested claim for the requisite number of years fatally undermined Webb's attempt to satisfy the requirements of 30 U.S.C. § 38 (1988).

Finally, Judge Child explored the issue whether Webb had found material in sufficient quantity and quality within the limits of each of the claims in question to support the discovery of a valuable mineral deposit within the meaning of the mining laws. The Judge determined that while adequate proof supported the existence of sufficient decomposed and hard granite on the Turkey Track Nos. 2 placer and 4 lode claims which could be deemed to be commercially valuable, there was no such evidence to confirm the presence of any valuable mineral deposit on the portions of the Turkey Track Nos. 7 and 8 lode claims not previously withdrawn from mineral entry or location (i.e., the west 180 feet of each claim). Judge Child then turned to the question of the effect of the Common Varieties Act, 30 U.S.C. § 611 (1988), on the validity of the Turkey Track Nos. 2 placer and 4 lode

^{10/} This question related not only to problems associated with the Turkey Track No. 2 placer claim but could also affect all three lode claims to the extent that appellant attempted to assert placer locations of granite in addition to these lode locations.

claims. That Act, Judge Child observed, eliminated common varieties of various minerals as locatable minerals effective July 23, 1955, thereby confining legitimate locations for such minerals to mining claims shown to be valid prior to that date, and necessitating that mining claims located afterwards for such material be supported by the discovery of a valuable deposit containing some property giving it a distinct and special value.

The Judge concluded that Webb had failed to meet his burden of establishing that the decomposed and solid granite on the claims displayed properties conferring upon them a distinct and special value or that boulders on the claims, which were occasionally removed and sold for landscaping purposes, boosted these claims above the common variety category. According to the Judge, no evidence demonstrated that the Turkey Track granite which was sold for decorative purposes exacted a higher price than other decorative stone in the area, nor did the data adduced during the hearing confirm that the material's color and ease of compaction resulted in higher prices or lower production costs. Thus, Judge Child held that the granite produced from the claims was a common variety not subject to location after July 23, 1955. He further held that the claims were not supported by a discovery as of July 23, 1955. Accordingly, he declared the Turkey Track No. 2 placer, both as described in the 1954 location notice and as sited on the ground by Webb, and the Turkey Track Nos. 4, 7, and 8 lode mining claims null and void. Webb thereupon pursued this appeal to the Board.

Webb frames three primary issues on appeal:

I. Where the Government has known for more than 40 years the location of the Turkey Track #2 claim and has engaged in affirmative conduct to promote mining on the claim, is the Government equitably estopped from denying the location and validity of the claim when to do so would cause substantial injury and serious injustice?

II. When the location notice for the Turkey Track #2 [claim] complied with the law in existence at the time [it was located], should it be invalidated because of laws that were changed more than 20 years later?

III. When the evidence is undisputed that there were mining operations on the Turkey Track claims from the early 1940's, have appellants acquired title to these claims by adverse possession?

(Appellant's Opening Brief at 9-10). Each of these questions will be examined seriatim.

Webb focusses his estoppel claim on two separate points in controversy: the situs on the ground of the Turkey Track No. 2 placer claim and the validity of that claim. Webb asserts that BLM knew or should have known, as, he contends, did the claim owners and "everyone," that

the Turkey Track No. 2 placer claim had been physically situated on the ground for almost 50 years in the area overlapping the Turkey Track No. 3 lode claim, since BLM had supervised the property from the 1940's, had accepted the assessment affidavits filed after the enactment of FLPMA, and had approved notices of intent and mining plans of operations for activities on the claim at that location. Even if the significant length of time between the initiation of mining on the claim in the 1940's and the filing of the contest complaint does not justify precluding BLM from challenging the location of the claim, Webb urges that BLM's affirmative conduct has created a serious injustice warranting such a sanction. Similarly, Webb insists that BLM should not be permitted to dispute the validity of the Turkey Track No. 2 placer claim because, before entering into a lease with Webb for the claim, Balls had sought and received BLM's opinion that the claim could be mined. Webb maintains that Balls relied on BLM's affirmative conduct and invested thousands of dollars in conducting mining operations on the claim and that failure to estop BLM under these circumstances would seriously injure Balls.

BLM, for its part, denies that the Government's actions estop BLM from challenging the location and validity of the Turkey Track No. 2 placer claim at the site overlapping the Turkey Track No. 3 lode claim. BLM observes that approval of a mining plan of operations does not constitute a determination of claim validity, pointing out that, not only did Potter testify that claim validity is not examined when mining plans are reviewed, but also that mining plan approval decisions specifically advise that such approvals do not signify a BLM determination as to a claim's validity. Moreover, even had BLM employees made the alleged representations to Balls, BLM contends that such representations are insufficient to preclude BLM from challenging the claim since 43 CFR 1810.3(c) specifically provides that reliance on information or opinions of BLM employees does not operate to vest any right not authorized by law and, in any event, the ultimate determination of claim validity does not occur until issuance of a patent.

Insofar as the alleged delay in instituting contest proceedings is concerned, BLM notes that, since title to the land embraced by mining claims remains in the United States until the claims are patented, the United States retains its authority to protect the public interest until such time as a mining claimant obtains a patent for his claim. BLM further argues that the uncorroborated oral advice provided by Government employees on which appellant purports to rely was directly contradicted by written information which he also received. There is, therefore, no factual foundation for estopping the United States in these proceedings.

[1] As we have noted on numerous occasions, the Board has well-established rules governing consideration of estoppel questions. In Ptarmigan Co., 91 IBLA 113, 117 (1986), aff'd, Ptarmigan, Inc. v. United States, No. A 88-467 Civil (D. Alaska, filed Mar. 30, 1990), aff'd, Ptarmigan, Inc. v. United States, No. 90-35369 (9th Cir. May 15, 1991), we summarized our approach:

First, we have adopted the elements of estoppel described by the Ninth Circuit Court of Appeals in United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970):

Four elements must be present to establish the defense of estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

Id. at 96 (quoting Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104 (9th Cir. 1960)). See State of Alaska, 46 IBLA 12, 21 (1980); Harry E. Reeves, 31 IBLA 242, 267 (1977). Second, we have adopted the rule of numerous courts that estoppel is an extraordinary remedy, especially as it relates to the public lands. Harold E. Woods, 61 IBLA 359, 369 (1982); State of Alaska, *supra*. Third, estoppel against the government in matters concerning public lands must be based on affirmative misconduct, such as misrepresentation or concealment of material facts. United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978); D.F. Colson, 63 IBLA 121 (1982); Arpee Jones, 61 IBLA 149 (1982). Finally, we have noted that while estoppel may lie where reliance on Governmental statements deprived an individual of a right which he could have acquired, estoppel does not lie where the effect of such action would be to grant an individual a right not authorized by law. See Edward L. Ellis, 42 IBLA 66 (1979).

Ptarmigan Co., 91 IBLA at 117. See also James W. Bowling, 129 IBLA 52, 54-55 (1994); United States v. White, 118 IBLA 266, 303-04, 98 I.D. 129, 149 (1991).

Although Webb apparently suggests that an estoppel claim can be sustained simply by affirmative conduct on BLM's part, the language quoted above clearly requires that such an allegation be grounded on affirmative misconduct by the Government. Moreover, in defining the element of affirmative misconduct, the Board has mandated that the erroneous statement of fact upon which reliance is predicated be in the form of a crucial misstatement in an official written decision. James W. Bowling, *supra* at 55, and cases cited therein. Webb has proffered no official written BLM decision specifically siting the Turkey Track No. 2 placer claim at the locale overlapping the Turkey Track No. 3 lode mining claim location nor has he submitted an official written BLM decision advising him that the Department had finally determined that the Turkey Track No. 2 placer claim was valid. See United States v. Johnson, 23 IBLA 349, 356 (1976).

In fact, not only did the written approvals of the notices of intent and mining plans of operations for that claim unequivocally disclaim any

intent to serve as determinations of the claim's validity, but BLM also informed Webb's lessee, by letter dated September 19, 1985, that the claims were being examined and might be subject to contest action. See Exh. A-45. Furthermore, BLM's acknowledgement and acceptance of filings submitted in accordance with the requirements of 43 U.S.C. § 1744 (1988) do not by themselves "render valid any claim which would not be otherwise valid under applicable law and [do] not give the owner any rights he is not otherwise entitled to by law." 43 CFR 3833.5(a). Thus, Webb has not shown the affirmative Government misconduct prerequisite to the successful invocation of an estoppel claim.

More fundamentally, estoppel could not apply in this case because precluding BLM from questioning the validity of the Turkey Track No. 2 placer mining claim would result in Webb obtaining a right which is not authorized by law. As has long been recognized, so long as legal title to land remains in the United States, the Department retains the continuing authority to inquire into the validity of mining claims. See, e.g., Schade v. Andrus, 638 F.2d 122, 124-25 (9th Cir. 1981); United States v. White, supra at 309, 98 I.D. at 152. To allow estoppel in situations where the record reveals that a claim is not supported by the discovery of a valuable mineral deposit would lead to the issuance of patents for public land even though the requirements of the law have not been met, resulting in the granting of a right not authorized by law to the detriment of the rights of the public which the Department is charged to protect. Id. at 309-10, 98 I.D. at 152. In such circumstances estoppel simply cannot lie. Id. at 310, 98 I.D. at 152.

Nor does laches bar BLM from disputing the legitimacy of the Turkey Track No. 2 placer mining claim since the United States, as holder of legal title, may contest the validity of a mining claim at any time until the claim is patented. See United States v. Verdugo & Miller, Inc., 37 IBLA 277, 282 (1978); United States v. Johnson, supra at 353; United States v. Zweifel, 11 IBLA 53, 98 (1973), aff'd sub nom. Roberts v. Morton, 549 F.2d 158 (9th Cir. 1977). Accordingly, we find no legal impediments to BLM's prosecution of this contest and appellant's argument that the Government should be estopped from proceeding with its challenges to the claims must be rejected.

Before turning to appellant's other primary contentions on appeal, however, we believe it is necessary to address two aspects of the decision below which, while not directly assailed by appellant, nevertheless have a direct bearing on the ultimate validity of the claims at issue. The first matter involves Judge Child's determination, described supra, that the east 1,320 feet of the Turkey Track Nos. 7 and 8 (with the exception of a sliver of land along the northern sideline of No. 8) were located on land which was not open for entry at that time. In the course of making this determination, Judge Child held that the east 1,320 feet of each of these two claims were located in the W $\frac{1}{2}$ sec. 22, while the remaining 180 feet were located within the E $\frac{1}{2}$ sec. 21 (Decision at 8). He further found that the

northern portion of the Turkey Track No. 8 was not located in sec. 22, inferentially placing this segment in sec. 15 (Decision at 9). As a factual matter, however, the Judge's determination as to the location of these two claims is simply wrong.

As a review of any of a number of exhibits would make abundantly clear (see, e.g., Exhs. C-1, C-13, A-33R), no part of either the Turkey Track Nos. 7 or 8 is located in sec. 21, nor is any part of the Turkey Track No. 8 located in sec. 15. Both of these claims are generally located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 22, with approximately 180 feet of these claims impinging upon the NW $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 22, and the northern sideline of the Turkey Track No. 8 invading the SE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 22. Judge Child's determination of the situs of these two claims is in error.

Paradoxically, however, while Judge Child mislocated these two claims, his legal conclusion that the land within the east 1,320 feet of the two claims (excepting the sliver along the north sideline of the Turkey Track No. 8) was not open to entry at the time that the claims were located is correct. As we pointed out above, as originally promulgated, Small Tract Classification Order No. 52 covered the E $\frac{1}{2}$ sec. 21 and the W $\frac{1}{2}$ sec. 22. On May 16, 1958, it was revoked as to the E $\frac{1}{2}$ sec. 21, and on September 17, 1958, it was revoked as to the NW $\frac{1}{4}$ and the W $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 22. This left only the E $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 22 within the ambit of the Order's segregative effect and this land remained withdrawn until 1965. Thus, when the Turkey Track Nos. 7 and 8 were located, land in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ in sec. 22 was not open to mineral entry and the locations were effective only with respect to those portions of the claims which were situated in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ or the S $\frac{1}{2}$ NW $\frac{1}{4}$. In other words, these locations were effective only with respect to the west 180 feet of each claim and a small segment of land along the north sideline of the Turkey Track No. 8. In effect, Judge Child reached the correct result for the wrong reasons.

[2] The second aspect of Judge Child's decision which warrants clarification relates to his conclusion that compliance with the annual filing requirements of section 314 of FLPMA, 43 U.S.C. § 1744(a) (1988), establishes compliance with the assessment work requirements of 30 U.S.C. § 28 (1988). This is simply not true. As we shall explain, compliance with the recordation and annual filing provisions of section 314 of FLPMA does not, either in theory or in fact, constitute compliance with the requirements relating to the annual performance of assessment work. The starting point of any understanding of the relationship between the recordation statute and assessment statute must be the recognition of the very different animating rationales of these two statutory enactments.

In Oregon Portland Cement Co., 66 IBLA 204 (1982), we provided the following short analysis of the theoretical basis and workings of the assessment requirement found in 30 U.S.C. § 28 (1988):

The purpose behind the statutory requirement that a mining claimant perform assessment work (30 U.S.C. § 28 (1976)) has been a desire to insure that claims are diligently developed and to prevent the locking up of land by claimants who have no present intent to develop the minerals located therein. See Powell v. Atlas Corp., 615 P.2d 1225 (Utah 1980). Until FLPMA, there was no general Federal requirement that assessment work be recorded; requirements of recordation were a matter of State law. The Federal law merely required that work be performed.

* * * * *

* * * Failure to record an affidavit of labor under State law, however, did not ipso facto, subject the claim to forfeiture. On the contrary, while the recording of assessment work was normally treated as prima facie evidence that the work had been performed and, in Oregon at least, the failure to record was treated as prima facie evidence that it had not, the question which determined the right of possession between rival claimants was whether or not the work had been performed. [Emphasis in original.]

Id. at 207-08. 11/

The foregoing must be contrasted with the underlying rationale of the annual filing requirement mandated by section 314 of FLPMA. In James V. Joyce (On Reconsideration), 56 IBLA 327, 328 (1981), we noted that "[t]he purpose of 43 U.S.C. § 1744 (1976), however, is to inform the Department of those claims existing on public lands and of the continued interest of the claimant in such claims" (emphasis in original). Thus, unlike the assessment statute which is complied with by the actual performance of the required work, a claimant can comply with the recordation statute merely by filing a copy of the proof of assessment work filed in the local county. Indeed, since the statute authorized the filing of a notice of intention to hold the claim in lieu of a copy of assessment work performed, a claimant could maintain his claim indefinitely without ever filing a proof of labor. But, while such a claimant would be in compliance with the recordation statute, he would only be in compliance with the assessment statute if he

11/ The Board's decision in Oregon Portland Cement Co., supra, was subsequently reversed, on different grounds, by the United States District Court for Alaska in Oregon Portland Cement Co. v. U.S. Department of the Interior, 590 F. Supp. 52 (1984). See also Oregon Portland Cement Co. (On Judicial Remand), 84 IBLA 186 (1984). However, as the Board subsequently noted in Buck Wilson, 89 IBLA 143, 146 n.2 (1985), the legal predicates of the District Court's opinion were, themselves, effectively overruled by the Ninth Circuit Court of Appeals in NL Industries, Inc. v. Secretary of the Interior, 766 F.2d 1380 (9th Cir. 1985).

had, indeed, performed the required assessment work or obtained a deferment therefrom. ^{12/} See Oregon Portland Cement Co., supra at 208-10. Thus, Judge Child's attempt to equate compliance with the recordation statute with compliance with the assessment statute is wrong as a matter of law.

Returning to the specific points pressed on appeal, Webb avers that the location notice for the Turkey Track No. 2 placer mining claim complied with the law in existence at the time of its location (1954) and should not now be invalidated based on laws that were changed more than 20 years later. Thus, he objects to Judge Child's determination that the location notice for the Turkey Track No. 2 placer claim was defective because no map, plat, or sketch of the claim was attached to the location notice and the notice provided no means of finding the claim on the ground, contending that pre-1978 Arizona law did not require a location notice to give a metes and bounds description or any description which would enable someone to pinpoint the property. Webb insists that the Turkey Track No. 2 notice was valid, asserting that it contained a fold which obfuscated the traverse from the quarter corner monument to the point of beginning. Any uncertainty on the face of the notice was eliminated, Webb maintains, by evidence that the area actually occupied as the Turkey Track No. 2 overlapped the site of the Turkey Track No. 3 lode claim. Webb also suggests that the statement in the location notice that the claim had been monumented amply proves that the claim was so monumented and that, although admittedly there were no claim markers around the quarter corner section where BLM places the claim, such markers were present in the area where the claim actually was located.

BLM counters that, even if the requirements of Arizona law were as lenient as appellant asserts, a point which BLM disputes, such leniency could not override the requirements of 30 U.S.C. § 28 (1988), that a claim "be distinctly marked on the ground so that its boundaries can be readily traced" and that records of mining claims contain "such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim." According to BLM, no substantive evidence exists demonstrating that the Turkey Track No. 2 placer claim was properly located on the ground as required by 30 U.S.C. § 28 (1988) at any location. Not only are statements in the location notice that the claim was monumented inadequate to establish such monumentation, but, BLM avers, none of the claim markers found in the vicinity of Webb's professed claim site denoted the Turkey Track No. 2 placer claim.

^{12/} We are aware, of course, that, under recent enactments of Congress, payment of the annual rental or maintenance fee for a mining claim discharges all obligations to perform assessment work for that claim. See, e.g., Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (Act), P.L. 102-381, 106 Stat. 1378-79 (1992), and 43 CFR 3833.1-5. These provisions, however, are not directly germane to the instant appeal.

BLM further maintains that the Judge's invalidation of the claim location based on state law rests on a solid foundation since the description in the recorded location notice was incapable of precise delineation, the evidence failed to place the description in the recorded location notice on the ground, no proof established that the fold in the location notice obscured anything, and no data demonstrated that Shifflet, the locator, or anyone else for that matter had monumented the claim, attached a map, plat, or sketch of the claim to the location notice, or filed an amended notice of mining claim curing the defects in the original notice. In any event, BLM observes, the description of the Turkey Track No. 2 placer claim fails to conform as near as possible to the system of public land surveys as required and, in fact, the recorded claim dimensions match those of a standard lode rather than a placer claim.

The disputed September 1, 1954, location notice ^{13/} for the Turkey Track No. 2 placer mining claim, states that, on that date, the locator, Robert Shifflet, marked the claim on the ground as follows:

Beginning at 1/2 Sec. marker in the south Sec. line of Sec. 22 T. 4 N. R. 3 E. [^{14/}] at a monument (post, stone or other monument) where this notice is posted; thence 600 feet to a Post, thence 1500 feet to a Post, thence 600 feet to a Post, thence 1500 feet to the place of beginning, containing 22.66 acres, all in Winifred Mining District, in the County of Maricopa, in the State of Arizona, about 1/2 mile in a west direction from Cave Creek Road.

(Exh. A-1). Although the description ties the claim to the quarter section marker between secs. 22 and 27 and provides the distances to each claim corner, it omits the direction from one corner to the next. Webb basically contends that this location notice, despite its glaring deficiencies, adequately evidenced the location of the Turkey Track No. 2 placer claim at a site not within a 600-foot radius of the identified quarter section marker but at a locale overlapping the Turkey Track No. 3 lode claim which, according to its September 1, 1954, location notice, was positioned 3/4-mile west from Cave Creek Road. See Exh. A-1. We cannot agree.

[3] In order to properly locate a mining claim, the locator must comply with both Federal and state location requirements. Patsy A. Brings, 119 IBLA 319, 327 n.13 (1991); Scott Burnham, 100 IBLA 94, 126-28, 94 I.D.

^{13/} The location notice entitled Notice of Mining Location Placer Claim consists of a pre-printed form with blank spaces for the locator to furnish information specifically delineating the boundaries of the claim. The form also advises that if the location embraces surveyed lands, "the claim must conform to such survey by rectilinear subdivisions." See Exh. A-1.

^{14/} The much-disputed fold occurs between the line ending with "T. 4 N. R. 3 E." and the line beginning with "at a monument."

429, 446-47 (1987); United States v. Haskins, 59 IBLA 1, 49-50, 88 I.D. 925, 950 (1981), aff'd Haskins v. Clark, No. CV-82-2112-CBM (C.D. Cal. Oct. 30, 1984); see also 43 CFR 185.3 (1954) ("[a] location is made by staking the corners of the claim, posting notice of location thereon and complying with the State laws"). Federal law mandates that a location be distinctly marked on the ground so that its boundaries can be readily traced and that location notices include "such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim." 30 U.S.C. § 28 (1988). ^{15/} A locator is not required to submit a precise description of the position of the claim; the description is sufficient if the claim may be found and identified by following the recorded description. Patsy A. Brings, supra at 325-26; United States Borax & Chemical Corp., 98 IBLA 358, 360 (1987); Outline Oil Corp., 95 IBLA 255, 259 (1987); Joe Ostrenger, 94 IBLA 229, 232 (1986); Arley Taylor, 90 IBLA 313, 316 (1986). "The purpose of requiring that the recorded description refer to a natural object or permanent monument is to give a starting point from which, by following the description, the markings of the claim on the ground may be found." Arley Taylor, supra; see also 2 American Law of Mining, § 33.09[3] (2d ed. 1984). ^{16/}

Webb concedes that the Turkey Track No. 2 placer mining claim has never been situated with one claim corner coinciding with the quarter corner monument between secs. 22 and 27, as indicated in the location notice. Thus, we need not decide whether the failure of the location notice to specify the course from one corner to the next invalidates the location.

^{15/} Technically, of course, placer locations are made under 30 U.S.C.

§ 35 (1988), and if, in accordance with that statute, placer locations are made by legal subdivisions in conformity to the public land surveys, it has been held that, for Federal purposes, there is no need to monument the claim corners. See, e.g., Hagerman v. Thompson, 235 P.2d 750, 757 (Wyo. 1951). In the instant case, however, regardless of where, if anywhere, one would ultimately determine the Turkey Track No. 2 is properly situated, it was clearly not located according to the legal subdivisions established by cadastral survey and the requirements of 30 U.S.C. § 28 (1988) as to the posting of the claim corners clearly applied.

^{16/} Although Webb avers that the Arizona statute governing the location notice at issue, section 65-107 of the Arizona Code Annotated of 1939, did not require a location notice to provide a metes and bounds description or "really any description which would enable someone to go find the property" (Opening Brief at 17), that statute, as quoted in Webb's opening brief, directed the locator to describe the claim with reference to some natural object or permanent monument that would identify the claim and to mark the claim boundaries at each angle of the claim. Thus, the statute is not as lenient as Webb suggests. More importantly, Webb's argument is an attempt to obscure the reality that not only is it impossible to ascertain the location of the Turkey Track No. 2 from the location notice but there is no evidence, whatsoever, that the claim was monumented at any location prior to 1961.

Rather, Webb maintains that a fold in the location notice obliterates the traverse from the quarter section corner to the point of beginning of the claim. Webb offers no evidence verifying this unsubstantiated assertion and our comprehensive examination of the location notice contained in the record discloses no suggestion that any information was written on the missing lines. ^{17/} We thus find no merit to Webb's speculation that, absent the fold, the location notice for the Turkey Track No. 2 placer mining claim would have included a traverse from the quarter corner section placing the beginning of the claim in the area overlapping the Turkey Track No. 3 lode mining claim. See Patsy A. Brings, supra at 326 n.10. That the location notice for the Turkey Track No. 2 placer claim explicitly identifies the claim as embracing land about 1/2-mile west of Cave Creek Road while the Turkey Track No. 3 lode claim location notice situates that claim 3/4-mile west of Cave Creek Road further bolsters our conclusion that, according to the location notices, those two claims do not cover substantially the same ground.

Flaws in a location notice's description of a mining claim do not necessarily invalidate a mining location. If the recorded claim description differs from its actual situs on the ground, the physical markings on the ground control. See Patsy A. Brings, supra at 327; United States v. Kincanon, 13 IBLA 165, 168 (1973). Webb acknowledges that the claim was not monumented on the ground at the location described in the location notice. He insists, however, that the evidence clearly establishes that the claim was properly monumented in the area where it actually exists, citing the location notice's statements that the claim was so monumented and Government admissions that claim markers were found in that area.

Webb's assertions to the contrary notwithstanding, we find that the evidentiary record simply does not substantiate the physical monumentation of the Turkey Track No. 2 placer mining claim anywhere on the ground. The bald statements in the location notice clearly do not suffice to prove that the claim was properly monumented. Furthermore, neither Clyde Murray, who conducted the validity examination of the claims for BLM, nor Harvey W. Smith, who surveyed the land for Webb in 1961, observed any stakes or signs of location for the Turkey Track No. 2 placer at the position posited by Webb when they investigated the area. See Tr. 266-67 (Murray) and Tr. 184 (Smith).

^{17/} The location notice contains one and one-half blank lines above the fold following Shifflet's handwritten identification of the claim's point of beginning at the "1/2 Sec. marker in the south Sec. line of Sec. 22 T.4 N. R. 3 E." Our review of the other location notices included in the record indicates that the claim locators typically did not leave lines blank in the middle of their claim descriptions; rather, all the necessary information was inserted on consecutive lines, with blank lines left after all such information had been transcribed.

Nor do several of the key exhibits prepared shortly after the claim's purported 1954 location reflect the existence of corner markers for the Turkey Track No. 2 placer claim in the area overlying the Turkey Track No. 3 lode claim. See, e.g., Exh. A-9 at 0035 (Mineral Examiner Donald F. Reed's Sept. 12, 1956, report); Exh. A-4 (William P. Crawford's 1957 map); Exh. A-19A, p. 42-86 (Smith's 1961 mineral survey); Exh. A-20 at 00012 (Webb's 1964 notice of patent application for the Turkey Track No. 3 lode claim which does not identify the Turkey Track No. 2 as a conflicting claim); and Exh. A-24 (Charles K. Miller's Apr. 26, 1965, mineral report for Webb's patent application for the Turkey Track No. 3 lode claim, among others). Thus, Webb has failed to prove that the Turkey Track No. 2 placer mining claim was physically situated and properly monumented and posted on the ground in the position asserted. Accordingly, we find that, not only did the September 1, 1954, location notice for the Turkey Track No. 2 placer mining claim fail to comply with the law in existence at the time it was executed and contain deficiencies fatally undermining its adequacy to verify that claim's location, but the claim itself was never properly located anywhere on the ground.

Moreover, even if the location notice were otherwise adequate to delineate the claim, Webb has failed to show that he has an unbroken chain of title to the original locator, Shifflet. His unsubstantiated statements that he had a deed from Shifflet transferring the claim, which deed was subsequently lost, does not suffice. That provision of Arizona law cited by Webb as allowing proof of such lost deeds by parol evidence (ARS § 39-141) applies only to lost deeds which have been recorded as required by law and Webb has neither alleged nor proven that his purported deed from Shifflet was ever recorded. See Exh. A-35 at 00003; see also Hugh B. Fate, Jr., 86 IBLA 215, 216-17 (1985) (more than unsubstantiated statement that claim was transferred from original locator to current claimant is needed to prove that claimant is successor in interest to mining claim).

Even if the Turkey Track No. 2 placer mining claim location failed to observe location formalities, Webb insists that he has nevertheless acquired title to that placer claim and the Turkey Track Nos. 4, 7, and 8 lode claims through adverse possession in accordance with 30 U.S.C. § 38 (1988). He contends that Arizona's 5-year statute of limitations covering actions to recover real property, A.C.A. § 29-102 (1939) (now codified at A.R.S. § 12-525), not the 10-year statute of limitations cited by Judge Child, applies to the adverse possession of the mining claims involved in this case. Webb maintains that extensive evidence supports the conclusion that material was removed from the subject claims, as well as the other 12 contiguous claims, as early as 1941, well before Webb's first use of the site in 1947. According to Webb, such proof includes receipts for material sold prior to 1954 and first-hand testimony by individuals who had extracted material from the area in the late 1940's and early 1950's. In the face of this data, Webb disparages BLM's reliance on a high altitude photograph, taken in January 1954 after a substantial rainfall, to demonstrate lack of mining activity on the disputed claims. Webb

thus contends that the requirements of the holding period were clearly satisfied and ample evidence demonstrates both production from the claims and the existence of a well-established market for the material produced.

BLM denies that Webb has proven entitlement to any of the claims in accordance with 30 U.S.C. § 38 (1988), asserting that the record is devoid of any substantive evidence establishing granite mining on any of the disputed claims prior to the date of that claim's location. Moreover, BLM notes Webb neglected to assert 30 U.S.C. § 38 (1988) placer locations in the 1979 filings which were submitted to BLM in compliance with 43 U.S.C. § 1744 (1988). Therefore, BLM argues that, even assuming arguendo appellant might have been able to assert placer locations under 30 U.S.C. § 38 (1988), he lost any such locations by his failure to record them as required by FLPMA.

BLM maintains that, in any event, in order to successfully demonstrate his qualifications under 30 U.S.C. § 38 (1988) for claims based on common variety granite, 18/ Webb must show that he or his predecessors in interest held and worked the Turkey Track Nos. 4, 7, and 8 lode claims for 5 years and the Turkey Track No. 2 placer claim for 10 years 19/ prior to the July 23, 1955, effective date of the Common Varieties Act, 30 U.S.C. § 611 (1988). BLM submits that, since satisfaction of the requirements of 30 U.S.C. § 38 (1988), only obviates the need to prove formal compliance with location requisites but does not eliminate the necessity of establishing proof of discovery, Webb must also establish the existence of a discovery on each claim in accordance with the prudent person and marketability tests as of July 23, 1955. According to BLM, the evidence is woefully inadequate to verify that the claims were held and worked for the requisite time period or that they were sustained by the discovery of a valuable mineral deposit.

BLM avers that Webb's activities in the area at issue did not commence until 1956 and were confined to prospecting and annual assessment work for lode claims, neither of which fulfills the directives of 30 U.S.C. § 38 (1988). Citing Webb's testimony in 1957 at the hearing in Contest 10,013 (Exh. A-3), BLM posits that, when he began working the claims in 1956, Webb's only interest was lode gold and that granite production at that time was limited to the Turkey Track No. 1 placer claim, a claim

18/ Webb's failure to challenge Judge Child's conclusion that the granite produced from the claims is common variety granite, BLM suggests, waives any objections Webb may have to this determination.

19/ BLM contends that the 10-year limitation period of A.R.S. § 12-526 rather than the 5-year period of A.R.S. § 12-525 applies to the Turkey Track No. 2 placer claim because the 5-year period applies only where a recorded deed exists and no duly recorded deed of conveyance transferring that claim from the original locator to Webb has been introduced.

which Webb sold in 1961. As further indication that Webb had no interest in granite in 1956, BLM points out that, if his own or his predecessor's initial intent encompassed decomposed granite mining, Webb should have located placer, not lode, claims, a distinction which Webb understood at that time. 20/

[4] The language of 30 U.S.C. § 38 (1988), provides, in relevant part, that:

Where such person or association, they and their grantors, have held and worked their claims for a period of time 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 * * * in the absence of any adverse claim.

This statute permits an individual who has held and worked a claim for the prescribed time period to assert a location without proofs of acts of location, recording, and posting. Cole v. Ralph, 252 U.S. 286, 305 (1920); see Robert L. Mendenhall, 127 IBLA 73, 81 (1993). It does not, however, dispense with other requirements of the mining laws. Cole v. Ralph, *supra* at 306; Robert L. Mendenhall, *supra*. Thus, an individual seeking to avail himself of the statute's provisions is required to affirmatively demonstrate that he "held and worked his claim in addition to such other showings as required by law." United States v. Haskins, *supra* at 52, 88 I.D. at 951 (emphasis in original); see Robert L. Mendenhall, *supra*.

Among the other substantive requirements of the mining laws with which a claimant under 30 U.S.C. § 38 (1988) must prove compliance is the mandated recordation of the claim under FLPMA. Hiram Webb, 105 IBLA 290, 305, 95 I.D. 242, 251 (1988), *aff'd sub nom. Webb v. Lujan*, 960 F.2d 89 (9th Cir. 1992). All claims, no matter how located, including claims based on 30 U.S.C. § 38 (1988), were required to be recorded with BLM under the provisions of section 314 of FLPMA, 43 U.S.C. § 1744 (1988). Gary Hoefler, 127 IBLA 211, 216 (1993); Hiram Webb, *supra* at 298-301, 95 I.D. at 247-49; United States v. Haskins, *supra* at 105, 88 I.D. at 978. Although the Turkey Track Nos. 4, 7, and 8 lode claims were timely recorded with BLM in 1979, in accordance with 43 U.S.C. § 1744 (1988), no placer claims embracing the lands included in those claims were recorded. See Exhs. A-16 and A-17.

It is true that appellant submitted documents with his location notices for the lode claims in which he asserted placer rights as appurtenant to those lode locations. Placer claims and lode claims, however,

20/ BLM's answer also contains an exhaustive point by point refutation of the facts and evidence alleged by Webb as proof that the claims were held and worked for the requisite period and contain valuable deposits of granite. See Answer at 9-44.

are two distinct types of claims. Paul Vaillant, 90 IBLA 249, 252 (1986); United States v. Haskins, *supra* at 44, 88 I.D. at 947. Placer discoveries will not sustain lode locations, nor will lode discoveries validate placer claims. Cole v. Ralph, *supra* at 295; Hiram Webb, *supra* at 303, 95 I.D. at 250; United States v. Haskins, *supra*. Furthermore, as we expressly held in Webb, placer rights do not inure to lode locations through the auspices of 30 U.S.C. § 38 (1988). Hiram Webb, *supra* at 303-05, 95 I.D. at 250-51. Rather, placer rights emanating from holding and working under 30 U.S.C. § 38 (1988) can only be asserted in the context of a placer claim. Id. at 310, 95 I.D. at 254.

The sole documents relating to the Turkey Track Nos. 4, 7, and 8 claims submitted to BLM for recordation in accordance with 43 U.S.C. § 1744 (1988) were copies of the original and amended lode location notices for each of those claims. See Exhs. A-16 and A-17. These documents were clearly inadequate to record any placer claims asserted under 30 U.S.C. § 38 (1988). See Hiram Webb, *supra* at 305, 95 I.D. at 251. Since Webb has provided no evidence that he timely recorded the Turkey Track Nos. 4, 7, and 8 claims as placer claims under 30 U.S.C. § 38 (1988), as required by 43 U.S.C. § 1744 (1988), those claims must conclusively be deemed to be abandoned and void. 43 U.S.C. § 1744(c) (1988); see Hiram Webb, *supra* at 310, 95 I.D. at 254-55. Therefore, we need not analyze whether Webb fulfilled the requirements of 30 U.S.C. § 38 (1988) and the other substantive mandates of the mining laws as to those claims.

[5] Webb timely filed a copy of Shifflet's 1954 location notice for the Turkey Track No. 2 placer claim with BLM for recordation in accordance with 43 U.S.C. § 1744 (1988) (Exh. A-17). Assuming, without deciding, that recordation of that invalid location notice would be sufficient to preserve whatever 30 U.S.C. § 38 (1988) rights Webb had to the Turkey Track No. 2 placer claim, we find that Webb has failed to affirmatively establish that he has "held and worked his claim in addition to such other showings as required by law." United States v. Haskins, *supra* at 52, 88 I.D. at 951 (emphasis in original). Such other showings include proof of discovery since, as the court in United States v. Haskins, 505 F.2d 246, 250 (9th Cir. 1974), observed, the purpose of 30 U.S.C. § 38 (1988) was "to obviate the necessity of proving formal compliance with requirements for locating a claim but not to dispense with proof of discovery."

Initially, we note that Webb has not challenged Judge Child's conclusion that the granite found on the claim is a common variety of granite and we see no reason to disturb this conclusion. Therefore, Webb must demonstrate that he had completed the requisite 5-year 21/ holding and working

21/ For purposes of our analysis, we have accepted as applicable the 5-year limitations period proposed by Webb, rather than the 10-year period posited by BLM, since we find that Webb has failed to satisfy even this lesser time period. See also United States v. Bowen, 38 IBLA 390 (1979).

period for the Turkey Track No. 2 placer claim and had discovered a valuable mineral deposit on that claim prior to the July 23, 1955, effective date of the Common Varieties Act, 30 U.S.C. § 611 (1988), which withdrew such minerals from location under the mining laws. See Charles House, 42 IBLA 364, 368 (1979); United States v. Guzman, 18 IBLA 109, 138, 81 I.D. 685, 699 (1974). This he has completely failed to do.

The operative statutory phrase in 30 U.S.C. § 38 (1988) is "held and worked." As we stated in United States v. Haskins, *supra* at 52, 88 I.D. at 951:

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.

Holding and working embody two separate concepts. While the performance of annual assessment work fulfills the requirement that the claim be worked, actual possession of the claim sufficient to establish the requisite holding demands more than mere compliance with the annual assessment work requirements. United States v. Haskins, *supra* at 52-55, 88 I.D. at 951-52.

The record contains no recorded affidavits of annual assessment work for the Turkey Track No. 2 placer claim for any period before July 23, 1955. While the failure to record proof of assessment work, as opposed to failure to perform such annual assessment work, is not fatal to a possessory claim under 30 U.S.C. § 38 (1988), we have noted that the absence of such recording properly gives rise to a presumption that the work was not performed. United States v. Johnson, 100 IBLA 322, 334 (1987); United States v. Haskins, *supra* at 100-103, 88 I.D. at 975-76.

Webb has tendered no evidence affirmatively demonstrating that the requisite work was performed on that claim. Instead, he has presented testimony and affidavits from various individuals claiming to have hauled granite material from the Turkey Track Granite Quarries in the 1950's as well as receipts documenting granite sales during that time period. None of the evidence positively establishes that \$100 worth of labor had been performed or improvements made on this claim as required by 30 U.S.C. § 28 (1988), since it fails to link such activity specifically to the Turkey Track No. 2 placer claim. Rather, the testimony generally refers to the Turkey Track Granite Quarries and the sales receipts are not even that identifiable. Furthermore, Webb himself testified that, although he bought granite in 1947-48 from the pit on the Turkey Track No. 1 claim owned by Landriault (an individual who, based on the record before us, never had an

interest in the Turkey Track No. 2 placer claim), he did not begin operating in the area until 1953-54 when he bought claims from Landriault. See Tr. 368-73. Thus, the record is not only devoid of proof that Webb worked the Turkey Track No. 2 placer claim for the requisite time period prior to July 23, 1955, it contains Webb's affirmative declaration that he, personally, neither held or worked any of the claims until 1953 at the earliest.

Moreover, possession sufficient to satisfy 30 U.S.C. § 38 (1988) requires keeping others out, and a peaceable adverse entry suffices to operate as an ouster of a person claiming possession. Belk v. Meagher, 104 U.S. 279, 287 (1881); United States v. Johnson, supra. Possessory title must be established by the maintenance of actual, open, and exclusive possession of the claim by the claimant combined with development, and requires marking the boundaries of the claim so as to afford actual notice of the extent and limits of the claim, coupled with actual possession and exclusion of all adverse claimants. Id. at 334-35 and cases cited therein. Webb's admission that he first began operating in the area in 1953-54, the lack of claim markers at the asserted claim location, and Shifflet's recording of his September 1, 1954, location notice for the Turkey Track No. 2 placer mining claim, which constitutes an adverse claim to any prior claim, 22/ all undermine Webb's professed possession of the claim for the requisite time period. We conclude that Webb has not shown that he had fulfilled the holding and working requisites of 30 U.S.C. § 38 (1988) prior to July 23, 1955.

We also find that the record does not confirm the discovery of a valuable mineral deposit within the limits of the Turkey Track No. 2 placer claim prior to July 23, 1955, or, indeed, at any time. 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, 322 (1905); Castle v. Womble, 19 L.D. 455, 457 (1894); see, e.g., United States v. Feezor, 130 IBLA 146, 189 (1994). This "prudent man" test has been augmented by the "marketability test," which requires a showing there is a reasonable prospect that the mineral can be extracted, removed, and marketed at a profit. United States v. Coleman, 390 U.S. 599, 602 (1968); United States v. Johnson, supra at 338. Additionally, in order for a mining claim for a common variety of mineral to be validated by a discovery, the prudent man/marketability test of discovery must have been met

22/ Webb's inability to establish any privity with Shifflet precludes him from adding his possession onto that of Shifflet. In any event, since he is claiming holding and working of the claim prior to Shifflet's location of the Turkey Track No. 2 placer claim, Shifflet's location can only be adverse to Webb's claim given that Webb has strenuously argued that Shifflet's location embraced the area which Webb asserts has always been the site of the Turkey Track No. 2 placer claim.

as of July 23, 1955, and have continued thereafter up to and including the time of a contest hearing. United States v. Fisher, 115 IBLA 277, 280 (1990); United States v. Johnson, *supra*. In a contest proceeding, while the Government initially bears the burden of establishing a prima facie case that a mining claim is invalid, it is the claimant who is the ultimate proponent of the validity of his claim and it is the claimant who bears the affirmative burden of refuting the Government's case by a preponderance of the evidence. *See, e.g., United States v. Mineco*, 127 IBLA 181, 187 (1993); United States v. Fisher, *supra* at 281.

At the contest hearing, BLM offered aerial photographs of the claim area taken in 1954, 1958, and 1964 with overlays for those photographs depicting claim locations and mining disturbances (Exhs. A-33A through A-33T) and the testimony of Bauer, who was accepted as an expert in aerial map reading (Tr. 54). Bauer opined that, based on his interpretation of the 1954 photograph and relevant overlays (Exh. A-33Q), there was no surface mining taking place on any of the claims, including the Turkey Track No. 3 lode mining claim. ^{23/} While more activity in the area was revealed in the 1958 photograph, Bauer testified that development of a surface mine on the Turkey Track No. 3 claim first appeared in the 1964 photograph. *Id.*

Bauer's interpretation of the photographs is bolstered by Reed's September 12, 1956, mineral report which, while mentioning the existence of granite on the Turkey Track No. 3 lode claim, does not indicate that any mining of that mineral had occurred on the claim. *See* Exh. A-9 at 0035, at 5. Additionally, in his 1957 testimony, Webb stated that, although he purchased and worked the Turkey Track No. 1 placer claim for granite, his intention was to work and develop an old gold mine on the lode claims (Exh. A-3 at 215-19). We find this evidence, coupled with the testimony of BLM witnesses who were present in the area in the early 1950's and saw no mining activity on the claims at that time (*see, e.g.,* Tr. 130-38 (Dr. Snyder) and Tr. 147-48 (Nichols)), more than suffices to establish BLM's prima facie case that no valuable mineral deposit had been discovered within the confines of the Turkey Track No. 2 placer claim, at the site alleged by Webb, prior to July 23, 1955.

Webb's evidence does not adequately rebut BLM's prima facie case. Although Webb presented his own expert, Andrews, who identified additional areas on the 1954 photograph as evidencing mining activity and opined that a significant rainfall a few days prior to the date of the photograph might

^{23/} It is important to keep in mind the fact that appellant alleges that the Turkey Track No. 2 placer claim generally overlapped the land within the Turkey Track No. 3 lode claim. Thus, the absence of evidence of any mining activity of the Turkey Track No. 3 claim during 1954 and 1958 also is directly relevant to the question of whether appellant held and worked the lands assertedly embraced within the Turkey Track No. 2 placer claim in conformity with the requirements of 30 U.S.C. § 38 (1988).

have obliterated signs of mining activity in the area (Tr. 461-77), BLM's cross-examination of the witness and Bauer's rebuttal testimony revealed weaknesses undercutting the persuasiveness of his conclusions. Additionally, the witnesses who testified that they removed granite from the Turkey Track Granite Quarries in the 1950's were generally unable to identify which claim they extracted the granite from or the exact dates of their granite purchases from Webb, although some purchases were acknowledged as occurring in the mid to late 1950's. See Tr. 442-44 (Myers); Tr. 595, 610 (Krumtum). Similarly, the sales receipts (Exh. C-38) do not specify which claim provided the acquired material. Evidence that minerals have been exposed and sold from claims within the general area does not suffice to show entitlement to a patent of a specific claim. Rather, a claimant must show that each claim is supported the discovery of a valuable mineral deposit within the meaning of the mining laws. United States v. Mavros, 122 IBLA 297, 302 (1992); United States v. Melluzzo, 105 IBLA 252, 257 (1988). Webb's failure to demonstrate that a discovery of a valuable mineral deposit existed on the Turkey Track No. 2 placer claim prior to July 23, 1955, renders that claim invalid for that reason alone.

In any event, the testimony of the witnesses who purchased granite from Webb indicates that, while some of the material was used for decorative landscaping (see, e.g., Tr. 597, 613 (Krumtum)), the primary use of the removed material appeared to be as fill or subgrade (see, e.g., Tr. 593, 611-12 (Krumtum); Tr. 622 (Stillman)). ^{24/} Material which is principally valuable for fill purposes, for road base, or for ballast, uses to which ordinary earth and rock may be put, is not and has never been locatable under the mining laws, and even if the material is valuable for other purposes, its value for the former purposes cannot be considered in establishing a discovery on a claim. United States v. Johnson, *supra* at 346-47; United States v. Wirz, 89 IBLA 350, 358 (1985), and cases cited therein. Thus, we must conclude that the Turkey Track No. 2 placer mining claim was properly found to be null and void.

In summary, we find:

- (1) that the Government is not estopped based on either alleged affirmative representations or by its failure to contest the claim at an earlier date from challenging the subject claims at the present time;
- (2) that the land within those parts of the Turkey Track Nos. 7 and 8 lode mining claims located within the E¹/₂ SW¹/₄ sec. 22 was not open to location under the mining laws when

^{24/} Even in the late 1980's, the main use for the granite produced from the Turkey Track No. 2 placer claim was as aggregate base material to be used as fill. See, e.g., Tr. 84 (Walker).

those claims were located in 1960 and, as to such land, no rights were acquired by those locations;

(3) that the evidence totally fails to support any assertion of a discovery of a valuable mineral deposit in lode form on any of the claims and, therefore, the Turkey Track Nos. 4, 7, and 8 lode mining claims are properly held to be null and void;

(4) that, insofar as the Turkey Track Nos. 4, 7, and 8 lode claims are concerned, the recordation of those claims in 1979 pursuant to the requirements of 43 U.S.C. § 1744 (1988) was ineffective to either preserve any alleged placer rights inuring to such lode locations or to constitute recordation of separate placer claims for the lands embraced within the lode locations under the aegis of 30 U.S.C. § 38 (1988);

(5) that the 1954 location notice for the Turkey Track No. 2 placer claim was, by itself, inadequate to definitively locate the claim on the ground and, since the evidence failed to establish that the claim was monumented on the ground, the location notice was a legal nullity and afforded the locator no rights;

(6) that, even if the 1954 location notice was deemed adequate to constitute an appropriation of land, the description provided in the notice of location cannot be read as embracing the same land now asserted to be covered within the Turkey Track No. 2 placer claim;

(7) that, even assuming that the 1954 location covered the land now asserted to be within the Turkey Track No. 2 placer claim, appellant has failed to establish any chain of title to that location and is, therefore, barred from asserting any rights to the land based on such a location;

(8) that, given the fact that it is now uncontested that the granite deposit found within the Turkey Track No. 2 placer claim is a common variety of stone and, as such, was removed from location under the mining laws by section 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1988), the assertion of a location under 30 U.S.C. § 38 requires evidence that the land within the asserted claim was held and worked for a minimum of 5 years prior to July 23, 1955, and appellant herein has failed to submit any probative evidence that either of these requirements have been accomplished;

(9) that appellant has similarly failed to establish the existence of a discovery of a valuable mineral deposit within the asserted limits of the Turkey Track No. 2 placer claim as of July 23, 1955; and

(10) that the overwhelming majority of the sales of granitic material from the Turkey Track No. 2 placer were for uses never cognizable under the mining laws and such sales could not be used to establish the existence of a discovery of a valuable mineral deposit, even if all the other impediments to the claim's validity, delineated above, could be ignored.

We must conclude, therefore, that Judge Child correctly held these four claims to be null and void.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Child's decision is affirmed as modified by this decision, and the Turkey Track No. 2 placer and the Turkey Track Nos. 4, 7, and 8 lode mining claims are declared null and void.

James L. Burski
Administrative Judge

I concur:

James L. Byrnes
Chief Administrative Judge

