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ARIZONA DEPARTMENT OF MINES AND MINERAL RESOURCES AZMILS DATA

PRIMARY NAME: EL RAME M.S. 4553

ALTERNATE NAMES:

MARICOPA COUNTY MILS NUMBER: 475A

LOCATION: TOWNSHIP 4 N RANGE 3 E SECTION 3 QUARTER S2
LATITUDE: N 33DEG 42MIN 53SEC LONGITUDE: W 112DEG 02MIN 14SEC
TOPO MAP NAME: UNION HILLS - 7.5 MIN

CURRENT STATUS: DEVEL DEPOSIT

COMMODITY:
SAND & GRAVEL

BIBLIOGRAPHY:
BLM MINING DISTRICT SHEETS
BLM MINERAL SURVEY MS 4553
U.S. DEPT. OF INTERIOR DECLARED CLAIMS NULL &
VOID 9-2-77
ADMMR EL RAME M.S. 4553 FILE

EL RAME MINE

MARICOPA COUNTY, CAVE CREEK
DISTRICT

WR GW 11-1-77 - Frank Melluzzo, Phoenix, claimant of 49 unpatented claims in Sec. 4, T4N, R3E, in the area of the proposed Cave Creek Flood Control Dam came in for help in a hearing scheduled December 9, 1977, by the BLM on the validity of the claims. He said a civil court hearing had been set for January 16, 1978, but that BLM has demanded a hearing before their judge sooner than expected, therefore, Mr. Melluzzo needs to assemble all the favorable evidence he can get as soon as possible. Read the file on his property and others in the vicinity. 11-8-77 bh

WR GW 11-2-77- Frank Melluzzo, Phoenix, called and requested an examination of his Gold Hill claims near Cave Creek dam. Arrangements were made for Monday, Nov. 7. 11-8-77 bh

2/15/78 - (Department of the Interior) IBLA 77-23, dated September 2, 1977. sef



STATE OF ARIZONA
DEPARTMENT OF MINERAL RESOURCES

MINERAL BUILDING, FAIRGROUNDS
PHOENIX, ARIZONA 85007

602/271-3791

MEMORANDUM:

To: John H. Jett, Director
From: Glen Walker, Field Engineer
Subject: A Reconnaissance of Frank Melluzzo's Claims
Date: November 8, 1977

This property consisting of a reported 49 unpatented claims is in Sec. 3 & 4, T4N, R3E, immediately south of the Cave Creek Flood-Control Dam. Another flood-control dam across Cave Creek is presently being built about 1/2 mile south of the existing concrete structure.

It is understood the B.L.M. has condemned 29 of the claims on the basis of them being "non-mineral in character." Because of a hearing scheduled by the B.L.M. on December 6, 1977, Mr. Melluzzo requested an examination of his lode claims by this Department.

On November 7, 1977, in company with Mr. Melluzzo a reconnaissance examination of the lode claims in contention was made.

The area is underlain by schist and greenstone which strikes about N50 E and dips steeply both east and west. Along the exceedingly steep ridges, which are encompassed within the claims, there are at least four siliceous structures intruded into the foliation of the schist which contain mineralization. The mineralization consists of obvious oxide copper, limonite, hematite, and in a few places chalcopyrite, there are gold and silver reported also. The extent of the mineralization varies considerably from a few to several feet.

As pointed out practically all the mineralization occurs parallel to the ridges west of Cave Creek at elevations of from 1700 to 1800 feet above sea level. The top of the present dam is at an elevation of 1,640 ft. Because of the fissure-like character of the mineralization there appears no reason why these ore deposits can't be mined above the highwater mark without interference from an "100 year flood."

GW/ap



IN REPLY REFER TO:

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

UNITED STATES

v.

FRANK AND WANITA MELLUZZO
(Supp. on Judicial Remand)

IBLA 77-23

Decided September 2, 1977

Review of Departmental decision remanded at the order of the United States Court of Appeals for the Ninth Circuit.

The decision in United States v. Melluzzo, 76 I.D. 160 (1969)^a is sustained.

1. Mining Claims: COMMON VARIETIES OF MINERALS-Location Prior to July 23, 1955-locatable vs. nonlocatable substances; DISCOVERY-Common Varieties of Minerals-Nature of Requirement-profitability.

Mining claims located for deposits of common varieties of building stone, sand and gravel, if located prior to the Act of July 23, 1955, must be held to be invalid where it is not shown that these materials could have been profitably marketed prior to that date.

2. Mining Claims: PRACTICE AND PROCEDURE-Contests-burden of proof-evidence -prima facie case-Hearings-burden of proof-prima facie case.

Where the Government contests mining claims on a charge of lack of discovery of a valuable mineral deposit prior to the date when such minerals were no longer subject to such location, the Government must initially present sufficient evidence to establish a prima facie case. The burden then shifts to the claimant to show by a preponderance of credible evidence that a discovery has been made on each claim.

INDEX CODE:

43 CFR §4.29(b)

32 IBLA 46

a) GFS(MIN) SO-26(1969)

GFS(MIN) 52(1977)

Where the expert witnesses called by the Government testify that prior to July 23, 1955, there was no profitable market for common variety minerals from the subject claims and that it would have been economic folly to undertake the development a mine thereon, a prima facie case of invalidity has been made. Thereafter, upon the failure of the claimant to prove the contrary by a preponderance of credible evidence, a determination that the claims are invalid is obligatory.

3. Mining Claims: DISCOVERY-Independence of Claims-Nature of Requirement-burden of proof.

Where the contestee is seeking to validate a group of claims, he must prove that a valuable mineral deposit exists on each individual claim. A showing that all the claims taken as a group satisfy the requirements of discovery is not sufficient.

4. Mining Claims: COMMON VARIETIES OF MINERALS-Location subsequent to July 23, 1955; DETERMINATION OF VALIDITY-Time of Determination; DISCOVERY-Common Varieties of Minerals; PRACTICE AND PROCEDURE-Hearings-findings.

Where, in a contest to determine the validity of certain mining claims located for common building stone, sand and gravel, the Government charges that the claims were not located prior to the Act of July 23, 1955, which prohibited the subsequent location of such minerals, the finding by the Hearing Examiner and two administrative appellate tribunals that the charge is true and the claims were not timely located requires a holding that the claims are null and void, where such finding is supported by a preponderance of credible evidence.

5. Mining Claims: PRACTICE AND PROCEDURE-Evidence-Hearings-burden of proof-evidenc.

The burden of the proponent is not simply to preponderate in the evidence produced; its burden is to produce a preponderance of credible evidence, and the trier of fact is not required to believe or give any weight to testimony which is inherently incredible.

APPEARANCES: Fritz L. Goreham, Esq., Office of the Field Solicitor, Department of the Interior, Phoenix, Arizona, for Contestant; Tom Galbraith, Esq., Lewis & Roca, Phoenix, Arizona, for Contestees.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

The Court of Appeals for the Ninth Circuit has remanded this case to the Board of Land Appeals with instructions to reconsider the Department's earlier holding in light of later cases decided by that Court. Melluzzo v. Morton, 534 F.2d 860 (9th Cir. 1976). The issue before the Court was the validity of six association placer mining claims located for sand, gravel, and building stone. All six claims are situated on the south side of Cave Creek Dam, approximately 15 miles north of Phoenix, Arizona.

The proceedings culminating in the decision by the Court were initiated by the Arizona State Office, Bureau of Land Management (BLM), in early 1963. The charges alleged that 1) the claims contained only common varieties of minerals not subject to location after July 23, 1955, 30 U.S.C. § 611 (1970); 2) the claims were not located before July 23, 1955; and 3) no discovery of a valuable mineral deposit had been made as required by the general mining law, 30 U.S.C. § 22 et seq. (1970).

After hearings in 1963 and 1964, the Department's Chief Hearing Examiner ^{1/} found that 1) all of the claims contain sand, gravel, and building stone; 2) the sand, gravel and building stone are common varieties of those materials, and, hence were not subject to location after July 23, 1955; 3) the claims were located after July 23, 1955, and thus were null and void; and 4) in any event, no discovery of a valuable mineral deposit subject to location had ever been made, as there was no market for any of the sand, gravel or building stone prior to July 23, 1955, when such deposits were removed from locatability by Congress, 30 U.S.C. § 611 (1970). That decision was affirmed on appeal to the Bureau of Land Management and then on appeal to the Department. United States v. Melluzzo, 76 I.D. 160 (1969)^a. The District Court for the District of Arizona awarded summary judgment to the United States in a suit for review instituted by Melluzzo. The Court of Appeals affirmed that part of the Department's decision holding that the sand, gravel, and building stone were common varieties of those materials and, hence, not locatable after July 23, 1955. 534 F.2d at 861. The Court did not address the related and critical issue of the date of location of the claims. The Court did, however, hold that the case should be remanded to

^{1/} The title "Hearing Examiner" has since been changed to "Administrative Law Judge" by order of the Civil Service Commission.

a) GFS(MIN) SO-26(1969)

the Department for a redetermination of the marketability of the deposits in light of decisions by that Court after the Department's 1969 decision in this case.

To comply with the instructions of the Court of Appeals a brief summary of that Court's holdings would be helpful. The general mining law provides that a person may receive title to his mining claim located on public land if, among other things, he has discovered a "valuable mineral deposit." From the earliest decisions of this Department, the quantity and quality of a deposit necessary to qualify as a "valuable mineral deposit" has always been determined by economic value. If a man of ordinary prudence would be justified in beginning actual mining operations on the evidence presented to this Department with a reasonable expectation of developing a profitable mining operation, then his mineral deposit is considered "valuable." Castle v. Womble, 19 L.D. 455, 457 (1894);^b Cameron v. United States, 197 U.S. 313 (1905). However, in order to demonstrate that one has prudent and reasonable expectations, one must show that under the present circumstances, the mineral deposit appears susceptible to extraction, removal, and marketing at a rate of profit sufficient to attract the means and labor of a prudent man. United States v. Coleman, 390 U.S. 599 (1968).^c

[1] The general mining law was amended in 1955 to provide that common varieties of sand, gravel, building stone, and other materials would not be subject to location after July 23, 1955, excepting, of course, claims which were on that day "valid existing claims." U.S.C. § 611 et seq. (1970); United States v. Coleman, supra. Claims located after that date for those materials are simply invalid. In order for such a claim located before that date to be considered a valid existing claim, a valuable mineral deposit must have been discovered before July 23, 1955. Palmer v. Dredge Corp., 398 F.2d 791 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969). Clearly, if there were no market on that date sufficient to induce a prudent man to begin actual mining operations, there cannot have been a discovery and the mining claim is invalid. Clear Gravel Enterprises v. Keil, 505 F.2d 180 (9th Cir. 1974); Palmer v. Dredge Corp., supra. A discovery after the date of the withdrawal of the operation of the mining law, whether by an actual physical exposure or a favorable change in economic conditions, cannot breathe life into a mining claim invalid on the date of withdrawal. United States v. Isbell Construction Co., 78 I.D. 385 (1971).^d

[2] When the United States contests a mining claim, the burden of proof is on the claimant to prove that he has a valid mining claim, for it is he who is the proponent of order pursuant to the Administrative Procedure Act, 5 U.S.C. § 556 (1970), to have his

b) GFS(MIN Supp) 1

c) GFS(MIN) JD-1 (1968)

d) GFS(MIN) 39(1971)

claim declared valid. Humboldt Placer Mining Co. v. Secretary of the Interior, 549 F.2d 622 (9th Cir. 1977); United States v. Zweifel, 508 F.2d 1150, 1157 (10th Cir. 1975), cert. denied, 423 U.S. 829 (1975), reh. denied, 423 U.S. 1008 (1975); United States v. Springer, 491 F.2d 239, 242 (9th Cir. 1974), cert. denied, 419 U.S. 834 (1974); Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959). Nevertheless, the Government has assumed the burden of going forward with sufficient evidence to present a prima facie case of the claim's lack of validity; but the ultimate risk of nonpersuasion remains with the claimant.

The Government has established a prima facie case when a mineral examiner testifies that he has examined the claim and found the mineral values insufficient to support a finding of discovery. United States v. Ramsey, 14 IBLA 152, 154 (1974);^e United States v. Blomquist, 7 IBLA 351 (1972).^f Obviously, the mineral examiner's conclusion must be based on reliable, probative evidence. United States v. Winters, 2 IBLA 329, 335, 78 I.D. 193, 195 (1971).^g But Government mineral examiners are not required to perform discovery work or to prove that a market does not exist. Rather, once a mineral examiner has testified, based on probative evidence, that a profitable market did not exist for a common variety mineral material prior to July 23, 1955, it is the claimant's burden of proof to show that, in fact, there then was a market which would have absorbed his material at a profit to him. United States v. Stewart, 5 IBLA 39, 79 I.D. 39 (1972).^h

The Court of Appeals for the Ninth Circuit has supplied further guidance in applying the law in this area and particularly in the area of the law dealing with sand, gravel, and other building material. Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971); Verrue v. United States, 457 F.2d 1202 (9th Cir. 1972); Clear Gravel Enterprises, Inc. v. Keil, 505 F.2d 180 (9th Cir. 1974); Melluzzo v. Morton, 534 F.2d 860 (9th Cir. 1976). This Board has discussed and applied those holdings of the Court in several cases. United States v. Gibbs, 13 IBLA 382 (1973);ⁱ United States v. Taylor, 19 IBLA 9, 32 I.D. 68 (1975);^j United States v. Osborne (On Remand), 28 IBLA 13 (1976).^k The holdings of these cases focus upon three propositions of concern here. First, the fact that the market for sand, gravel, and other building material is adequately supplied by existing sources is not conclusive of the issue of whether an additional supplier can enter the market successfully. Barrows v. Hickel, supra; United States v. Gibbs, supra. Second, while a lack of sales from a claim may be sufficient to establish a prima facie case of invalidity of the claim, it is not conclusive and may be overcome by a preponderance of evidence that a prudent man could have marketed the material at a reasonable profit. Verrue v. United States, supra; United States v. Gibbs, supra. Third, in

e) GFS(MIN) 12(1974)

f) GFS(MIN) 59(1972)

g) GFS(MIN) 16(1971)

h) GFS(MIN) 11(1972)

i) GFS(MIN) 102(1973)

j) GFS(MIN) 13(1975)

k) GFS(MIN) 76(1976)

determining marketability, both the demand and the supply sides of the actual market must be considered. With respect to demand, the claimant must be allowed to demonstrate the existence of demand that would absorb his material, even if, as noted, the market is already adequately supplied. With respect to supply, a hypothetical market must be created which includes all potential sources of supply. If the amount of material would be such a superabundance that the price would be lowered below a profitable level, then the claim cannot compete in any realistic economic sense. Melluzzo v. Morton, supra at 864.

THE EVIDENCE

As we noted earlier there are two principal issues in this case. First, was the sand, gravel, and building stone marketable on July 23, 1955, and thereafter? Second, were the claims actually located before July 23, 1955? To some extent the evidence is overlapping, especially with respect to credibility. Indeed, the one paramount issue in this case is the credibility of Melluzzo and his witnesses. We are inescapably compelled to conclude both by the totality of the circumstances of this case and by many prior inconsistent statements that Melluzzo's testimony has none of those characteristics ordinarily associated with veracity. The lack of veracity and prior inconsistent statements were noticed by the Chief Hearing Examiner who also conducted several other hearings involving the claimant.

MARKETABILITY

The claims in question, the Rena Nos. 1 through 6, were situated approximately 15 miles north of Phoenix, Arizona, and cover two hundred forty acres of land, much of it within the bed of an intermittent stream known as Cave Creek. At the time of the hearing in 1964, the claimants had over 100 other claims in addition to these six. Many were located for sand, gravel, and building stone, and some were located for copper.

At the hearing two witnesses for the Government testified that there was simply no market for sand, gravel, or building stone in the area of the claims either 1955 or in previous years. Lewis S. Zenter, a mining engineer employed by the Bureau of Land Management, testified that in 1962 he had made a study of market conditions as of 1955. He was told by construction companies and others, including Melluzzo's competitors, that there was no market for such remote material before or during 1955 (Tr. 122-124). While that testimony alone would probably be insufficient to make a prima facie case, see Verrue v. United States, supra, it is bolstered by the testimony of a disinterested witness who had been in the area since 1925 and

had been employed by the Bureau of Public Roads since 1930. From 1936 to 1963, the witness, Charles H. McDonald, had been the materials specialist for the Bureau of Public Roads projects in Arizona. In that capacity he had developed an extensive firsthand knowledge of aggregate deposits in Arizona and considerable expertise in the varying qualities (Tr. 595-621). He testified that any demand for the material on these claims during the 1950's was so distant that it would be "economic folly" to try to make a profit from the claims (Tr. 620-621). He added that there was no feasible economic market until the 1960's (Tr. 621). Several other witnesses, including a mining engineer and weekend prospectors, testified that they had been in the area many times from 1956 through 1959 and had never found any sign of either mining activity or monuments marking the location of the claims.

The testimony of all the witnesses, and especially that of Charles MacDonald, based as it was on extensive firsthand experience, establishes prima facie that 1) there was no market for the material on these claims prior to 1960 and 2) no mining activity took place on these claims prior to 1960. Thereby, the burden was shifted to the claimants to show by a preponderance of the evidence that there was a market sufficient to attract the efforts of a prudent man in mid-1955 and thereafter.

The claimants actually introduced very little evidence tending to show the existence of a market for any substantial amount of these materials during or prior to July 1955. Neither did they introduce much evidence bearing on actual costs of production or selling prices. The reasons they did not do so may be inferred readily by the surrounding circumstances. First, there simply was no demonstrated market for sand, gravel, or building stone from these claims during or before 1955. Second, the claimants probably expected that the existence of a market in 1955 would ultimately be irrelevant as nearly the entire thrust of their evidence was aimed at showing that the sand, gravel and building stone on the Rena claims were uncommon varieties of those materials and, consequently, locatable after July 23, 1955. The only market conditions which would then be relevant would be the conditions at the time of the hearing in 1963 and 1964. By that time a market had developed. Nevertheless, the claimant's testimony with respect to marketability will be reviewed.

The Rena claims, according to a map introduced by the claimants, (Exh. R), were 15 air miles north of the northern boundary of Phoenix, Arizona, in 1954, the date of the map. There was apparently a very sparse population between the claims and the northern boundary of Phoenix. There were several references in the testimony to deer hunting in the vicinity. Even as late as the hearing in 1964, what market there may have been was still several miles to the south and

east of the Rena claims (Tr. 476). There was testimony that due to building north of the Phoenix city limits, the market north of Northern Avenue was 15 percent the total market by 1964. However, Northern Avenue is 12 air miles south of the Rena claims. There is no evidence that there was a significant market in 1964, much less 1955.

Nevertheless, Melluzzo asserted that he would deliver sand and gravel in 1962 for \$1.00 per cubic yard (Tr. 482). While he did not at any point in his testimony discuss his costs of doing business, one of Melluzzo's witnesses suggested a handling cost of \$.6 to \$.10 per ton mile. That figure is in general agreement with testimony presented in other cases. See, e.g., United States v. Osborne (On Remand), 28 IBLA 13 (1976).¹ However, no other data on costs were presented.

The claimants did, however, state that a number of sales had been made between December 1954 and July 1955 of sand, gravel, and building stone (Tr. 466-468). Melluzzo stated that 600 tons of sand and gravel were sold between December of 1954 and July of 1955, yielding \$250 or \$300 (Tr. 723), though he conceded that no great amounts had been sold until 1962. Interestingly, Zentner testified that he first observed the existence of the haul road on October 31, 1962, which he had not seen during his previous examination of the land on March 7, 1962 (Tr. 43, 45, 82; Exh. 9). Also, he saw no excavations on the claims at that time (Tr. 79). Melluzzo also stated he had sold 100 to 150 tons of building stone from December 1954 to July 1955, mostly for \$9 per ton, but some for as much as \$60 per ton. ^{2/} Based on Melluzzo's figures, then, his total sales from the Rena claims would have been between \$1,200 and \$2,700. That testimony is, however, inconsistent with statements made by Melluzzo in many other hearings. For example, in 1956, Melluzzo instituted a private contest against other claims. At the hearing in that case, he testified that all but \$750 of his income had come from three claims, the Nita Jean No. 1, the Nita Jean No. 2 and the Concetta. Melluzzo v. Call, Arizona Contest 9946 (February 15, 1956) (Tr. 97-99). See Exs. 34A and 34B. In another contest heard in April 1958, United States v. Melluzzo, Arizona Contest No. 9866, Melluzzo stated that he had sold 160 tons of building stone from another group of claims in 1955, thereby accounting for several hundred dollars more than his total income from mining in 1955 without even considering the Rena claims. From yet another group of

^{2/} Melluzzo testified at one point that his 1954 income was \$5,000 to \$6,000 (Tr. 812) and at another point he testified that it was "six or seven, or \$8,000" (Tr. 786). However, at that time he was also in the window-cleaning business, had a home and store rental business, and land in Prescott for summer homes (Tr. 809).

1) Id.

claims, the Enterprise group, under contest by the government in United States v. Melluzzo, Arizona Contest No. 10591 (1964), Melluzzo testified that he had sold 300 to 400 tons of building stone in 1955. In a patent application for another claim, the Dino S, to which Melluzzo eventually obtained patent, Melluzzo claimed to have produced 234 tons of stone between June 1955 and September 1956 for revenue of \$2,816 (Exh. 42).

It is obvious to this Board that Melluzzo has accounted for his 1955 income from mining several times over, depending on which group of mining claims were being challenged. At the time of each contest, Melluzzo would simply attribute the bulk of his minerals income to whichever group of claims was under attack. But perhaps the most telling contradiction in Melluzzo's testimony was the testimony given at a hearing involving several claims known as the Arizona placers. It is important to understand that the Rena claims are at least 9 miles from the Arizona placers and that the Rena claims are completely covered by several of a group of claims located for copper, the El Rame Nos. 1-42. At the hearing in United States v. Melluzzo, Arizona Contest No. 9866, held in April 1958, Melluzzo testified under cross-examination:

Q. You had, I believe, or held 1, 2, 3, 4, 5, claims?

A. Yes.

Q. Five claims adjoining the Arizona placer claims?

A. Yes.

Q. You were removing material from those claims in 1957 and selling it?

A. That's right.

Q. That's six claims:

A. That would be more than that.

Q. Now, were you also obtaining material from ground other than these six claims in 1957 and selling it?

A. Yes.

Q. Now, where were those sources?

A. They were within a mile of there.
[Emphasis added].

Q. And they were also mining claims?

A. Right.

Q. Patented or unpatented?

A. Some were patented and some of them were unpatented.

Q. How many claims were there in that group?

A. Do you mean the acreage?

Q. Give us the number of claims first, and then the approximate acreages.

A. I couldn't tell you how many I have got.

Q. Can you give us an estimate? Three or four or five?

A. In twenty-acre claims, is that what you want? Do you mean - you see, I have a copper mine, 900 acres, and there is 42 claims up there. [Emphasis added.]

Q. In 1957 were you removing building material from those claims?

A. No. There was no building material there. [Emphasis added.]

(Tr. 742). Melluzzo's testimony that his other sources of building material were all within 1 mile of the Arizona placers and that there were no building materials on or near his copper claims (which covered the Rena claims) is strong evidence that there was no market of any kind for the material on the Rena claims and that Melluzzo was fully aware of that fact in 1958.

Moreover, the credibility of much of the rest of Melluzzo's testimony on marketability is equally at variance with other evidence presented at the hearing. For example, Melluzzo testified that some stone from the Rena claims was sold by him and delivered to the residences of Robert Wurzbarger and W. J. Caruthers, respectively. In support of this testimony Melluzzo introduced photographs of the rock walls allegedly built with that stone (Exh. W-3, W-4, W-5), and bills showing payment of \$180 received from Wurzbarger for 5 tons of

black stone (Exh. 26; Tr. 704), and \$120 received from Caruthers for 10 tons of stone (Exh. 27; Tr. 705). He testified that he delivered each load to these addresses (Tr. 705), and was paid for them in cash each time at "so much a load, pick-up load, and the bills represented the total of the whole job" (Tr. 707). These deliveries allegedly occurred in August and November 1954, before the Rena placer claims were supposed to have been located. ^{3/} Melluzzo explained this by saying, "[I] was taking rock from the Rena claims even before I located them" (Tr. 708). Subsequently, Melluzzo testified that Wurtzburger had paid him \$700 (Tr. 803). He also testified to other sales of stone in the same neighborhood. Melluzzo described a sale to one Keith Terrell for which he was paid partly in cash and partly by Terrell's contribution of labor, but said that the sale to Caruthers was not on that basis (Tr. 794-95):

Q. Did you get money from Caruthers?

A. Yes.

Q. How much?

A. He paid almost all of it because he had TB and had only one lung and couldn't lift all this rock.

However, when Caruthers was called as a rebuttal witness, his testimony flatly contradicted almost everything Melluzzo had said concerning the alleged sales to himself and to Wurtzburger (Tr. 871-891). He denied repeatedly and emphatically that either he or Wurtzburger ever paid Melluzzo anything for stone. He insisted that Melluzzo had never delivered stone to either of them. Some of the stone walls shown in the photographs entered as exhibits were already in place when he moved there on September 8, 1954. Wurtzburger was his next-door neighbor, and they were acquainted with Melluzzo. Caruthers testified that Melluzzo had given him and Wurtzburger permission to take stone. They went and got the stone themselves from Melluzzo's "7th Street claim" (the Nita Jean placers). None of it came from the Cave Creek area, with which Caruthers was familiar, where the Rena claims were supposed to be located. Caruthers and

^{3/} The dating of the bill to Wurtzburger in August 1954 is at variance with Melluzzo's testimony as to when sales from the Renas commenced (Tr. 448):

Q. When did you first commence sale of stone off the Renas 1 through 6?

A. At the beginning of December just before I located it.

Q. Of what year?

A. 1954.

Wurzburger hauled the stone in 1955, and each built walls on their respective properties. They did all their hauling from the 7th Street claim in Wurzburger's truck. They never used Melluzzo's truck or had any other assistance from Melluzzo. On being shown Exhibit 27 (Melluzzo's bill to Caruthers for \$120), Caruthers disclaimed any knowledge of it and reiterated that he had never paid for the stone. He stated, "[Melluzzo] just told us to get the rock. He wanted us to get them, and we hauled them" (Tr. 879).

Melluzzo also testified that stone from the Rena claims, supplied by him, was used in the retaining wall at 118 West Hatcher Road (Exh. 31) and to a "Dr. Fusco's clinic" across the street, both before 1955 (Tr. 464, 788). However, Harold Fox, who has lived at 118 West Hatcher Road since September 1952, testified that he had built the wall with stone that he had collected himself in various places in a wide radius around Phoenix (Tr. 881), and that none of it came from the area of the Rena claims or from Melluzzo's stone yard (Tr. 887-88). He also testified that Dr. Fusco's clinic was not built before 1956.

Carlo Incardone testified that he worked for Melluzzo from November of 1954 to November of 1955 (Tr. 412), dividing his time about equally between window washing for an hourly wage, and gathering rock, for which he was paid by the ton (Tr. 412, 415). He testified that he and his son, Peter, gathered the rock in the truck provided by Melluzzo, and that his son actually worked (Tr. 413-14, 416-17). He then said he would take Peter whenever he was not in school (Tr. 417). However, it then was elicited that Peter would be 15 years old on June 12, 1964 (Tr. 418). Thus, during most of the year when Incardone was employed by Melluzzo, Peter was 5 years old.

There are other such examples of unreliable testimony, prior inconsistent statements and testimony directly contradicted, and a great deal of Melluzzo's testimony was extremely vague. There was scant testimony by others that the material from the Rena claims was marketable at a profit during the 7-month period between the alleged location of the claims on December 20, 1954, and the removal of such materials from location on July 23, 1955. Therefore, it can scarcely be held that the preponderance of the evidence established that the material was then marketable even if that evidence were given total credence. It is clear, however, that much of Melluzzo's testimony is utterly lacking in credibility.

What the witnesses for the contestees described as "mining" or "quarrying" the Rena claims consisted simply of picking up individual rocks from the surface. Melluzzo had an old 2-ton flatbed truck and a 4-wheel drive pickup. Because the access to most of the area was so poor, the flatbed would be parked and the pickup would be used

to gather stone, which then would be brought back and reloaded on the flatbed (Tr. 240). If they were in an area where "it was good picking" it would take only three or four hours to get a load, but if they had to pry the stone from the face of the walls of the dry wash it would take "from six to seven hours, if you were doing very good" to get a truckload like that (Tr. 241). Edward Barlow testified that from January 1 to July 23, 1955, the stone removed from the area amounted to "several truckloads" (Tr. 238), or "several ton" (Tr. 239). Such operations usually consisted of two men. Barlow testified he also took several loads of gravel, saying, "Well in this gravel there was sand and everything else, but it was not sifted on the job, so we just loaded it" (Tr. 242). Carlo Incardone testified that they got sand the same way. They just drove the truck to "any place that we saw there wasn't too much topsoil on," where "we used to shovel everything that came along, grass, weeds and all" (Tr. 420). Incardone estimated that it would take about an hour and a half to get a pickup truck load of rocks off the surface of the ground (Tr. 419).

There was no testimony regarding the amount of time it took to make the round trip from stone-yard to "quarry," or how long it took to unload the truck on return.

Incardone divided his time working for Melluzzo, spending about 50 percent washing windows and 50 percent gathering stone. He was paid an hourly rate for window washing and by the ton for the stone he brought in. The rate for the stone was flexible, depending on the kind of rock. They got "as high as \$4 and \$5 a ton," (Tr. 413), or as little as \$3.

Melluzzo testified that this was standard procedure (Tr. 753):

A. They are the same men. They are the same men that work one job. They are washing windows and they are miners, the next minute, and they are ditch diggers the next minute. When I needed them I didn't go hire new men. I told them I was the owner and I was boss. I said, "Boys, this is what you want to do," and that's what they did. They didn't care what it was.

Q. Let's talk about window washing. How did you pay them at the window-washing job?

A. That was an hourly basis.

Q. On an hourly basis?

A. Yes.

Q. And then when you told them you wanted them to quit washing windows and go out there and haul rocks, then you put them on a tonnage basis?

A. Most of the time, yes, unless it was just to go out there and help me.

Q. Did the men have a right to say, "You pay me by the hour window washing and I don't want to mine"?

A. I had one or two that did that, but they didn't work for me the next day, I canned them.

This testimony speaks eloquently of the "profitability" of the stone-gathering operation and the economics of Melluzzo's mineral materials supply business. Apparently Melluzzo's window washing business could not keep his crew busy full time. If an employee wanted to earn an hourly wage at least part of the time, he had to accept rock-gathering assignments on a piece-work basis which paid very poorly the rest of the time.

Although such an operation might indeed yield a profit, it cannot be regarded as "mining" or "the development of a valuable mine" which the Congress intended to reward and encourage by grants of title to public lands.

[3] There is yet another, equally compelling reason for concluding that contestees failed to carry their evidentiary burden. They failed utterly to show a discovery of a valuable mineral deposit on each of the 6 separate 40-acre Rena claims or on any single one of them. Where a contestee is attempting to establish the validity of a group of claims he must prove that a valuable mineral deposit exists on each individual claim. An attempt to show that all the claims in several groups, or all the claims in a particular group, taken as a whole, satisfy the requirements of discovery, is not sufficient. An assumption that a discovery on one claim can inure to the benefit of another is a mistake of law. Henrikson v. Udall, 229 F. Supp. 510, 512 (D. Calif., N.D., 1964), aff'd 350 F.2d 949 (9th Cir. 1965), cert. denied 384 U.S. 940 (1966); United States v. Gardner, 14 IBLA 276, 81 I.D. 58 (1974);^m United States v. Colonna and Co. of California, 14 IBLA 220 (1974);ⁿ United States v. Bunkowski, 5 IBLA 102, 79 I.D. 43, 51 (1972);^o United States v. Thomas, 78 I.D. 5, 9 (1971).^p In short, if it takes the mineral from six or more claims together to warrant a prudent man to attempt to develop a valuable mine, then none of the claims may be regarded as valid, as each claim must be supported by discovery of a valuable mineral deposit within its own boundaries.

m) GFS(MISC) 16(1974)

n) GFS(MIN) 15(1974)

o) GFS(MIN) 13(1972)

p) GFS(MIN) 1(1971)

Virtually all of the evidence adduced by the contestees was referable to the six Rena claims as a group, and to the use and value of stone from that group of claims when used in combination with stone from other groups of claims. Melluzzo had no records and no idea as to what volume or percentage of the stone allegedly taken and sold at a profit came from any particular claim (Tr. 538-53). Nor did he supply any estimate of what percentage or volume of his stone sales as a whole came from the Rena group as opposed to his numerous other claims or groups of claims.

Melluzzo testified that most of jobs he described where stone was used had "some" or "a few pieces" of stone from the Rena claims in the wall. He explained this by saying that he brought in stone from a large number of his claims and his customers would select a variety, so that it was not possible to estimate what percentage came from the Renas in any particular case without examining the job and trying to identify individual stones as having come from the Renas (e.g., Tr. 714, 715, 806-07), an endeavor which proved to be not very successful, as has been seen (Tr. 788, 790-91, 796). Moreover, he kept no records as to which of the claims was the source of stone from that general area (Tr. 541, 546). He and his employees did not restrict their stone-gathering activities to the area of the Rena group, but collected building stone from perhaps dozens of other claims and groups of claims held by Melluzzo and his associates, including some which in 1963 he said he still had not recorded and could not remember the names of. This is perhaps best illustrated by Melluzzo's testimony at Tr. 550-51:

Q. Now, how many quarries do you have in the Phoenix area?

[Objection overruled]

THE WITNESS: I think I mentioned the other day 8 or 9.

BY MR. LUOMA:

Q. You have 8 or 9 quarries?

A. Yes.

Q. Do you consider the Rena group as one of your quarries?

A. Yes.

Q. Do you consider that as one quarry?

A. Yes.

Q. And would you consider that as an integral part of your whole operation?

A. Yes, for the sand and gravel and that type of rock.

Q. And do you consider it as an important part of your whole operation?

A. Oh, yes, yes.

This is entirely consistent with testimony given in another Melluzzo contest involving the 23 lode and placer claims in the 7th Street group, the Enterprise group, and the Cram group, which testimony is recited in United States v. Melluzzo, 76 I.D. 181, 191 (1969),^q of which we take official notice pursuant to 43 CFR 4.24(b):

So far we have been discussing only the 7th Street group. When we examine the Enterprise group, we find practically no credible evidence as to production prior to July 23, 1955. We have only Melluzzo's testimony which is inconsistent with and contradictory to his testimony in earlier hearings and statements, as the hearing examiner has well pointed out. Such production as there was amounted to no more than the picking up of an occasional truckload of surface stone from some of the Enterprise claims. The appellants' evidence falls far short of the preponderance of evidence necessary to show a discovery of a valuable mineral deposit on each Enterprise claim.

Appellants' testimony in another direction points out the lack of a discovery on each claim in issue. Dino Melluzzo testified that their stone business could not have been maintained in 1955 if they did not have all their claims, including not only the ones in issue but also the Rena claims "and many others" (Tr. 370, 372, 373). In fact he said that 40 or 50 percent of their stone in 1953, 1954 and 1955 came from the other claims (Tr. 375-376). Frank Melluzzo testified more positively in the following colloquy with the hearing examiner (Tr. 1517-1519):

Q. If you owned only the Concetta claim, and no other claims, could you make a business out of the selling of the rock?

A. Out of which?

q) GFS(MIN) SO-26(1969)

Q. Could you make a business out of the selling of rock from the one claim?

A. Absolutely not. You couldn't do it.

Q. Is that true in each of the other claims individually?

A. What you would have, you would have a business like, for example, I can show you something that everyone would understand.

You have a grocery store, and you have canned milk, and you have baby food. You might be all right for people that want canned milk and baby food, but I will guarantee you too many people aren't going to buy from your store for just that canned milk or baby food.

They want to come in there and get corn flakes and they want to get oranges and they want to get bananas, and the same way with a mining claim.

Yes, you could operate a business with one claim, but of one variety of stone, and when a man says, "I want red," you are out of business. If he says, "I want blue," you are out of business, and any other color he wants, if you don't have it. He has to go to another stoneyard, and that is what we are having the problem now. That is why I am still today buying stone from other claims, * * *.

Other assertions were made that all the claims are necessary to supply the variety of colors and even shapes that are desired by customers and that business will be lost unless the requests can be met (Tr. 681, 907, 1115, 1369).

This strongly supports the conclusion that none of the claims in issue can satisfy the test of discovery in that a prudent man would not invest time and money in any one claim with a reasonable prospect of success in developing a valuable deposit.

That decision went on to affirm the holding that all 23 claims involved in that contest were null and void. However, in 1970, this Board acted on a petition for reconsideration of the departmental decision in that case. That petition was supported by statements from present and former land office personnel, and indicated that their investigation of various buildings erected in the period from

1951-1955 had shown that the production from the North 7th Street group in 1954 was 298 tons, grossing \$3,526., and that in 1955 it was 580 tons, grossing \$8,700. This Board requested further information, as recounted in our decision which set aside the previous administrative decisions. We quote from that decision, Frank and Wanita Melluzzo, 1 IBLA 37, 40 (1970):^r

In our request for further information, we had asked that the Melluzzos sign a stipulation setting out, as to each claim, the amount produced and sold by them prior to July 23, 1955. We intended, by having statistics on which the United States and the claimants agreed, to put an end, if possible, to the confusion that has arisen from the vagueness and conflicts in Frank Melluzzo's testimony in this and other proceedings. The stipulation as presented is of little help, for it not only leaves uncertain the Melluzzo position as to these individual claims, but scarcely inhibits the use of some "floating" production in other contests.

There is, however, some indication of how the production was distributed among the three claims. The Chief, Branch of Minerals, Phoenix Land Office, who took part in the investigation, has submitted some comments on this point. Of the stone he observed in the various buildings he estimated that 2/3 came from the quarries on the Nita Jean No. 2, 1/3 from those on the north end of the Nita Jean and none came from the Concetta. He also observed no opened quarries on the Concetta.

If all of this production and revenue is attributable to the Nita Jean (7th Street) group in 1954-55, then practically none can be attributed to any of the numerous other claims held by Melluzzo and his associates, including the Rena group, and certainly there has been no showing of the existence of a discovery of a valuable mineral deposit within the boundaries of any particular Rena claim as of that time. At the hearing of that contest on February 14, 1956, Melluzzo was asked regarding his material sales in 1954, "Was all that sold from these two claims [Nita Jean and Nita Jean No. 2]?" To which he responded, "From those two claims. I had no other claims." (Tr. 733-36).

The record shows that in 1954-55 Melluzzo was just getting started in the mineral materials supply business. Yet he was claiming dozens of mining claims and asserting title to perhaps thousands of acres of public land in order to supply one modest stone yard with its stock of common stone, sand and gravel. Even though he might have been able to take a few truckloads of material from each claim and sell them at a profit, that would not be enough

^r) GFS(MIN) 4(1970)

to validate any one of them. Such activity would not constitute a bona fide intent to develop a valuable mine nor would it demonstrate that any particular claim contains a "valuable" mineral deposit on which a sustained profitable, commercial mining operation be conducted. See United States v. Osborne (On Remand), 28 IBLA 13, 29 (1976).^s

Thus we hold that the contestant's prima facie case of non-marketability was not overcome by a preponderance of credible evidence and that the Rena placer claims were properly held to be invalid for this reason.

DATE OF LOCATION

[4] The other principal issue is the date of location of those claims, for even were there a market for the material from the Rena claims, if they were located after July 23, 1955, they were null and void, as common varieties of sand, gravel, and building stone were withdrawn from location on that date. 30 U.S.C. §§ 611-615 (1970).

As noted above, this issue was raised specifically in the Government's contest complaint. The Hearing Examiner, in his decision dated November 9, 1964, discussed this issue and the evidence relating thereto in considerable detail, and he expressly found that the six Rena claims were not located prior to July 23, 1955. On appeal to the Director, BLM, this issue was again thoroughly explored, and by decision dated February 11, 1966, the decision of the Hearing Examiner was affirmed. Appeal was then made to the Secretary of the Interior. In the decision styled United States v. Melluzzo, 76 I.D. 160 (1969),^t the Assistant Solicitor, Branch of Land Appeals, noted that one of the charges in the contest complaint was that the claims had not been located prior to July 23, 1955; that the Examiner had held that this charge was true in fact; and that his decision had been affirmed by the Chief, Office of Appeals and Hearings, BLM. Id. at 163-64. The Assistant Solicitor devoted most of his opinion to an analysis of the common variety and marketability issues, concluding that the material on the Rena claims were common stone, sand and gravel for which no profitable market existed prior to July 23, 1955, and thus the claims were invalid for lack of discovery. Having so held, the Assistant Solicitor stated:

Since we have concluded that the materials on the claims are common varieties of sand, gravel and stone, which were not marketable prior to July 23, 1955, it follows that the claims are invalid. Therefore we need not review extensively the dispute over the date on which the claims were located, for even if they were located prior to July 23, 1955, they are nonetheless

^s) GFS(MIN) 76(1976)

^t) GFS(MIN) SO-26(1969)

recognized, invalid ones eliminated, and the rights of the public preserved." Cameron v. United States, 252 U.S. 450, 460-61 (1920). Therefore, in no event could the validity of the Rena claims be recognized by this Department without a resolution of this issue.

The claims were not recorded by Melluzzo until December 18, 1962 - eight years after he asserts he located them, and about 7-1/2 years after the law prohibited the location of claims for common varieties of stone, sand, gravel and other like mineral materials. The evidence that the claims were not located on December 20, 1954, or at any time prior to July 23, 1955, is very convincing. An understanding of the circumstances which led to the initiation of this contest proceeding contributes much to an appreciation of the evidence.

Lewis Zentner, a mineral examiner for the BLM saw no sign of workings on these claims in March 1962, while on other business in this area (Tr. 23). However, in October 1962, when informed of an alleged trespass in the area, he investigated and found a mining operation stripping large amounts of sand and gravel from the area (Tr. 24). He found one Linsenmeyer in charge of the operation, who stated that he had an agreement with Melluzzo to strip the overlying sand and gravel so that Melluzzo could get at the underlying lode deposit (copper) (Tr. 28). Melluzzo had located most of the land in the area in 1957 for copper pursuant to the mining laws pertaining to lode claims. At the time Zentner checked the trespass area there was no record anywhere of any claims having been located as placers or for such placer material as sand, gravel, or stone.

After Zentner's investigation of the alleged trespass, the BLM received an inquiry from Otto H. Linsenmeyer, the owner of the company performing the stripping operations. He wrote on behalf of Melluzzo asserting that he had an agreement with Melluzzo to remove the overburden at no charge to Melluzzo (Exh. 41). There was no mention of any intention on the part of Melluzzo to do anything but remove overburden from his lode claims. On November 9, 1962, the BLM served All State Materials Corp., owned by Linsenmeyer, with a notice of trespass directing it to cease operations at once. The pits made by the corporation were also posted against any further trespass. All State filed a response with BLM on November 20, 1962. It attached a copy of a "PERMIT TO REMOVE OVERBURDEN." This "permit," signed by Frank Melluzzo and dated May 8, 1962, gives Linsenmeyer the right to remove overburden from a number of the El Rame copper lode mining claims. There is no mention made of any placer claims (Exhs. 10, 20). At the hearing in this case in 1963 and 1964 an agreement between Melluzzo and Linsenmeyer was introduced (Exh. 11). That agreement, dated May 8, 1962, provided that All State may remove sand, gravel, and silt from some of the lode claims located for copper. Again, there is no mention of any placer claims.

On December 20, 1962, Melluzzo recorded location notices for six association placer claims, the Rena Nos. 1 through 6. The claims were all in the area of the sand and gravel that had been removed by Linsenmeyer (Exhs. 3-8). The notices all contain the statement "Dated and posted on the ground this 20 day of Dec. 1954," and each is signed by both Frank and Wanita Melluzzo.

The BLM then brought both these contest proceedings and others, contesting the validity of both the placer claims and the lode claims located for copper. The testimony and exhibits given in these hearings reveals that Melluzzo almost certainly located the six placer mining claims, the Rena Nos. 1-6, in December 1962, not in December 1954.

The BLM mineral examiner, Zentner, testified that in November 1962 he examined the claim area, accompanied by Melluzzo. They walked together through the area and Melluzzo "at various times would point out what he considered indications of valuable mineral, copper, on these claims. The rock is green, is a green stone" (Tr. 39). Zentner then testified as follows:

Q. What was the purpose of your covering this ground with Mr. Melluzzo on that date?

A. We were identifying, attempting to identify mineral associated with lode claims at that time.

Q. Well, was there any discussion about any placer claims?

A. No. There was not.

Q. Was there any discussion about lode claims?

A. Yes, there was.

Q. What were these lode claims?

A. These lode claims, according to Mr. Melluzzo, were valuable for copper. He pointed out up there at the east end of the dam some trenching in which there was exposed some secondary copper in lenses, small lenses. Except for those lenses there I don't recall, I did not see any other copper mineralization other than some minute staining occasionally, on any of the rest of the claims.

(Tr. 40, 41).

Zentner's only purpose in conducting this November 1962 inspection was to examine Melluzzo's El Rame lode claims from which placer material was being removed, but Melluzzo made no reference at that time to the existence of the Rena placer claims, or any placer claims, on this land (Tr. 97-101, 115, 916). Zentner further testified:

Q. And that as a result of that gravel pit he would be able to remove the surface gravels and also expose the rock in place on the bottom, is that what he said?

A. He said he had no interest in the gravel that was being removed. His sole purpose was to get it out of the way. He had come into the office previously and said, "Where can I dump this material so I can get down to the bedrock? You wouldn't let me put it anywhere around here."

Q. When he made that statement was he speaking as to these claims?

A. These lode claims, yes.

Q. Of what lode claims?

A. The El Rames. He didn't say which lode claims.

Q. How many El Rames does he have?

A. He has between forty and fifty El Rames.

Q. And how many cover this particular area?

A. Four of them.

(Tr. 100).

* * * * *

A. He stated that this was a stripping operation to remove material from his lode claims. He didn't want to move it over on any other lode claims because he would be covering up his valuable mineral. Therefore, he was allowing these people to move this material out of the area.

(Tr. 132).

The following month, December 1962, Melluzzo filed for record the location notices for the six placer claims here at issue, the Rena Nos. 1 through 6, alleging that they had been located in 1954. It is incredible that Melluzzo would not have mentioned them during his joint examination of the land with Zentner, had they in fact existed at that time, particularly in light of the fact that they had then inspected the placer workings on what was subsequently revealed as the site of the Rena No. 4 placer claim. Also, after the BLM issued the trespass notice Melluzzo and Linsenmeyer came to Zentner's office to discuss it. Zentner testified that they told him that the purpose of the removal was to get the overburden off the lode claims, and that Melluzzo was receiving no remuneration for the material (Tr. 28). This was in November 1962 (Tr. 29). There was no mention of placer claims (Tr. 32).

Moreover, Melluzzo apparently never told anyone else about the location of the Rena placers, including a number of other people who really deserved to know. Not one witness testified to ever having heard mention of the Rena placers by name prior to December 20, 1962, or having seen any written reference thereto. As mentioned above, on May 8, 1962, Melluzzo gave Otto Linsenmeyer a "Permit to Remove Overburden" (Exh. 10) from 18 of the El Rame lode claims, some of which blanketed the area of the Rena placers, which Melluzzo allegedly had located for stone, sand and gravel. The text of this document, signed by Melluzzo, reads:

Otto H. Linsenmeyer is hereby permitted and authorized to remove the sand, gravel, rock and silt from the premises hereinbelow described, until such time as said materials are entirely removed from said premises, the same being an overburden to mining claims held of record by the undersigned, and which will enable the undersigned to effectively pursue his mining claims heretofore recorded.

If Melluzzo had located placer claims for these materials, why would he not tell Linsenmeyer about them? Further, if Melluzzo regarded the sand, gravel and rock as a valuable mineral deposit for which he had located placer claims in 1954, why would he grant permission to take them "until such time as said materials are entirely removed?" And what "mining claims" of his could he "effectively pursue" if this material were removed?

When BLM served Linsenmeyer with a notice of trespass for the unauthorized removal of these materials, he responded with an affidavit (Exh. 20), in which he asserted his authority under the "permit" from Melluzzo to remove overburden from the El Rame lode claims. This document is dated November 20, 1962. It is apparent

A. My assessment work is so much work done, and I file my affidavits of labor if I do it.

Q. Do you want to answer the question now?

A. All right, go ahead.

Q. Was he to do any assessment work on the Rena placer claims?

A. He knew nothing about the Rena placer claims.

Melluzzo attempted to explain his failure to record the Rena claims and file affidavits of annual assessment work by testifying that he believed the placer claims were protected by the El Rame lode claims on the same land, which were recorded and for which affidavits of labor were on file, saying, "[I]f you have a lode a person cannot place a placer on top of a lode" (Tr. 839). This is an erroneous statement of the law, but even if it were correct, the explanation raises more questions than it answers. The Rena placers allegedly were located in 1954. The El Rame lodes were not filed until 1957. Thus, the El Rame lodes would have offered no protection to the Renas during the interim, even under Melluzzo's distorted concept of the law. He attempted to explain this by saying first that the property "was so inaccessible that nobody even wanted to go out there" (Tr. 840), and that evidence of his workings on the claims constituted visible proof that he was claiming the land, although he admitted that his "workings" on most of the claims consisted of little indentations on the surface where he had picked up individual stones, and that such surface indications would probably disappear with the next rain (Tr. 844).

Mrs. Frank Melluzzo, who signed the location notices as co-locator, testified that she did not know whether she signed the documents on the date indicated thereon, December 20, 1954, because "He has more than one claim so I couldn't possibly say" (Tr. 896).

Moreover, the Arizona Revised Statutes provide, at 27 ARS § 207:

The locator of a placer mining claim shall locate the claim in the following manner:

* * * * *

3. By recording within 60 days after the date of location a copy of the location notice in the Office of the County Recorder.

Melluzzo, of course, alleges that he delayed recordation for 8 years. "A location of a mining claim is not made by taking possession alone, but by working on the ground, recording, and doing whatever else is required for that purpose by the acts of Congress and the local laws and regulations." Belk v. Meagher, 104 U.S. 279 (1881).

In order for a placer mining claim to be valid it must have been located timely for placer material, such as sand gravel or building stone; conversely, in order for a lode claim to be valid it must have been located for a lode material such as gold, silver, or copper within veins, for as the Supreme Court noted in Cole v. Ralph, 252 U.S. 286, 295 (1920), "A placer discovery will not sustain a lode location, nor a lode discovery a placer location."

This is precisely the situation that Melluzzo found himself in at the time of the BLM trespass investigation in late 1962. He had some lode claims of very dubious validity located for copper. He was removing sand, gravel, common dirt, silt, and stone from the claims and allegedly receiving remuneration from his permittee/lessee. However, unless he had some better legal basis than copper lode claims of dubious validity for removing the placer material, he was very likely to be found liable for trespass, and he had received official warnings to that effect (Tr. 771, Exh. 40).

The evidence clearly shows that Melluzzo found himself caught in the dilemma just outlined. He resolved it by misrepresentation. In fact, nearly all of the evidence elicited at the hearing supports the finding—including many prior inconsistent statements by Melluzzo himself—that the claims were located in December of 1962, not December of 1954.

Five of the six forms on which Melluzzo swore that the claims were "Dated and posted on the ground this 20 day of Dec. 1954," were not even in print until 1958 (Tr. 921). We have noted earlier in the discussion of marketability Melluzzo's statement under oath that there was no building material in this area. We quote again from Melluzzo's testimony in that case:

A. * * * You see, I have a copper mine, 900 acres, and there is 42 claims up there.

Q. In 1957 were you removing building material from those claims?

A. No. There was no building material there.

United States v. Melluzzo, Arizona Contest No. 9866 (August 15, 1958). The six Rena claims are located for sand, gravel, and stone,

common building materials, which Melluzzo stated throughout this hearing were used for building purposes. It is inconceivable that Melluzzo would give the preceding testimony in 1958, if the Rena claims had been in existence at the time, and valuable deposits of building material had been discovered for which a profitable market had then existed for more than 3 years. Moreover, a search of the records of Maricopa County for the years 1954 to 1962 revealed that affidavits of labor had been filed on his other claims at one time or another during that period, but no affidavit had ever been filed on the Rena claims, though they, too, were supposedly in existence at that time (Exh. 38). 6/

Moreover, during the entire time from the beginning of the investigation of the trespass charges by BLM employees to the initiation of contest proceedings, Melluzzo never indicated that he had placer claims in this area. Normally, any person facing trespass charges in similar circumstances would not hesitate to assert his placer claims as a basis for his removal of the sand, gravel, and stone. For 2 months, Melluzzo failed to do so. To remain silent when a person would normally defend himself in such circumstances strongly raises the inference that there were no such claims at that time. The fact that the leases between Melluzzo and Linsenmeyer and the "Permit To Remove Overburden" refer only to the El Rame Lode claims and not to the Rena placer claims strongly supports that inference. It seems almost inconceivable that a claim owner would not inform his permittee, who had been officially warned against trespass, of the legal basis for the claimant's belief in his ownership of the material.

After reviewing the evidence, it is clear that the Government has made a prima facie case that the six Rena claims were not located until December of 1962. The contestees have presented some evidence that the claims were located in 1954. Most of that evidence consists of Melluzzo's own assertions that the claims were located then. But the one element lacking in Melluzzo's testimony is credibility. We

6/ The following is an excerpt from p. 14 of the Hearing Examiner's decision:

"Among the documentary exhibits received in evidence were copies of all of the affidavits of labor signed by Frank Melluzzo (Exhs. 36-A through 36-0) recorded in Maricopa County and a summary sheet (Exh. 38) listing the affidavits in chronological order. The list includes affidavits of labor for the Nita Jean Nos. 2, 3, and 4; Concetta No. 1; Dino S; a number for the Enterprise group; the P. and M. Enterprise group; the El Rame group; the La Fe; and the La Fe No. 1. There are no affidavits of labor for the Rena placer claims on record."

find that not only has Melluzzo failed to overcome the Government's prima facie case, he has buttressed the Government's case with prior inconsistent statements, failure to speak when the circumstances call for it, failure to present a single document recorded before December 18, 1962, referring to the Rena claims, and his obvious need for a defense to the trespass charge. The Rena claims were not located before December of 1962 and consequently are invalid, as claims located for sand, gravel, and other common varieties could not be located after July 23, 1955.

[5] This Board has authority to reverse the fact findings of the hearing examiner, even when not clearly erroneous. However, where the resolution of the case is influenced by his findings of credibility, which in turn are based upon his reaction to the demeanor of the witnesses, and such findings are supported by substantial evidence, they will not be disturbed by the Board. State Director for Utah v. Dunham, 3 IBLA 155, 78 I.D. 272 (1971), citing United States Steel Co. v. NLRB, 196 F.2d 459, 467 (7th Cir. 1952); NLRB v. James Thompson & Co., Inc., 208 F.2d 743, 745-56 (1953); Broadcast Music, Inc. v. Havana Madrid Restaurant Corp., 175 F.2d 77-80 (2nd Cir. 1949). This is because the trier of fact who presides over a hearing has an opportunity to observe the witnesses, and is in the best position to judge the weight to be accorded testimony. United States v. Lee Chartrand, 11 IBLA 194, 212, 80 I.D. 408, 417 (1973).^u It is apparent from a reading of the Hearing Examiner's decision in this case that he did not place a great deal of credence in Melluzzo's testimony regarding either the marketability issue or the date of location issue. As noted by the Court in another case involving the validity of claims located for common variety mineral materials:

The burden of the proponent, plaintiff here, is not simply to preponderate in the evidence produced, its burden is to produce a preponderance of credible evidence, and the trier of fact is not required to believe or give weight to testimony which is inherently incredible.

Osborne v. Hammitt, 377 F. Supp. 977, 985 (1964).

In conclusion, we find that the bulk of the evidence presented by Melluzzo is unworthy of credence. However, even were we to ascribe full weight and credibility to that evidence, it would still fall far short of the preponderance required to overcome the contestee's prima facie showing to the effect that it would have been "economic folly" to attempt to develop a valuable mine on each of these claims or upon any particular one of them.

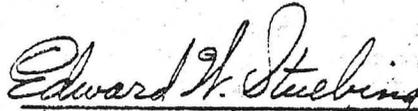
Further, we find that the Rena placer claims Nos. 1 through 6 did not in fact exist on or before July 23, 1955, being located

u) GFS(MIN) 66(1973)

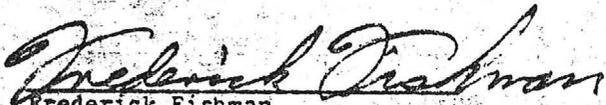
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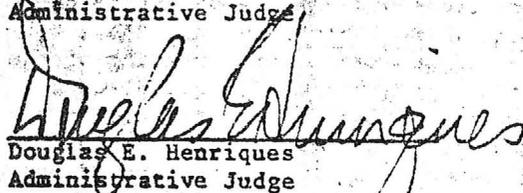
thereafter in violation of the Act of July 23, 1955, 30 U.S.C.
§ 611 (1970).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we find that the Rena place mining claims numbers 1 through 6 were properly held null and void by the decision styled United States v. Melluzzo, et. al., 76 I.C. 160 (1960), which decision is hereby sustained.


Edward W. Stuebing
Administrative Judge

We concur:


Frederick Fishman
Administrative Judge


Douglas E. Henriques
Administrative Judge

1 The El Paso group of mining claims is situated in the Union Hills, 19 miles
2 north of Phoenix, four miles east of the Black Canyon Highway, and two miles west
3 of the Cave Creek Road, in Maricopa County, Arizona. They cover two north-south
4 trending ridges which are on the west and east flanks of Cave Creek, in sections
5 3 and 4, township 4 North, range 3 East, G. and S. R. B. and E. They extend for
6 a distance of one mile south of the old Cave Creek flood control dam. The ridge
7 on the west bank rises some 260 feet above the creek bed, the one on the east bank
8 to 400 feet.

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9 The basic rock formation of this area is a pre-Cambrian granite. Locally
10 this rock has been metamorphosed to dark chloritic schist, which is called green-
11 stone. Planes of schisticity are vertical and strike north-south. Numerous
12 trenches, open-cuts, shafts, and adits are found on the claims on both ridges.
13 Almost without exception mineralization in the form of iron oxides (limonite,
14 hematite), copper carbonates (malachite, azurite), and silicates (chrysocolla)
15 are found in the bedding planes of the schist. In several instances chalcopryrite
16 (copper-iron sulphide) is found. This is of significance because such sulphides
17 are normally primary in origin, and indicate that mineralization may have been
18 deposited from hypogenic (ascending from below) solutions, and that the minerali-
19 zation may extend to considerable depth. In other words, the copper and iron
20 minerals found in the outcrops may be only residual values remaining in the upper
21 leached or oxidized zone. If this is so, then concentrations of mineral may be
22 expected to be found below, in a zone of secondary enrichment, at the ancient or
23 premanent water level, perhaps even below this in the primary zone. This could
24 only be determined by a systematic program of diamond (core) drilling, which
25 should extend to a depth of 500 to 1000 feet. Such a program would be expensive
26 and highly speculative. Justification may be found in the fact that many of the
27 great open-pit copper mines now operating in the state were developed from
28 surface showings similar to these.

29 The El Paso group consists of 47 lode-mining claims, 34 of them covering
30 section 4 on the west bank of Cave Creek, 16 of them in the west half of section
31 3 on the eastern bank.

32 A mining engineer when evaluating a mining property or a mineral deposit

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1 considers several factors. He first notes the district or area in which the
2 property is situated. Is it an area in which there is a history of production?
3 Second, is the geological formation and structure one which is favorable for
4 mineral deposition? Third, is there evidence that valuable minerals have been
5 deposited? If the answers to each of these questions is positive, then there is
6 a distinct possibility that exploration may disclose the existence of valuable
7 ore-deposits. These conditions are found on the El rane group of claims. Two
8 patented mining claims, the Milwaukee and St. Paul claims extend over 3000 feet
9 in a southwesterly direction from the west end of the old Cave Creek dam. An
10 200 foot shaft and the foundations of an old mill are found on one of these claims.
11 Copper ores were mined from this shaft. The old Union Mine and the Jack White
12 Mine, both former producers, are found about $2\frac{1}{2}$ miles south in sections 21 and 22.
13 The Jack White Mine was in operation in 1936.

14 The geologic formation on both ridges is a chloritic schist, a metamorphosed
15 rock formed by heat, pressure and movement. In other words, a zone of deformation
16 favorable for mineral deposition.

17 Copper minerals are found on the outcrops of all of the claims, in many
18 shallow trenches, pits, and shafts and were known to extend to a depth of 200
19 feet on the patented claims. These copper minerals in the form of carbonates
20 and oxides, and the iron oxides, limonite and hematite, are typical of the res-
21 idual values found on the surface of many of the open-pit mines operating in
22 Arizona today. These mines are operating on ores containing as little as 0.50% Cu.

23 There is, therefore, a distinct possibility that deposits of copper ore
24 MAY exist in a zone of secondary enrichment, which may be 500 to 700 feet below
25 the surface, or even deeper in the primary zone. This could only be determined
26 by means of exploratory diamond(core) drilling.

27 The Corps of Engineers did drill several holes at the proposed dam site, but
28 these holes were drilled for the purpose of determining the stability of the bed-
29 rock as a base for the dam. The deepest was about 100 feet and no assays to
30 determine mineral content were taken. I talked to Mr. Fenimore Turner, Geologist
31 for the Corps in Los Angeles, where the drill cores are presently stored. Over
32 the telephone he told me that he had visually examined the cores and had not seen

1 any copper minerals in any of them, that the only mineralization observed was
2 in the form of iron oxides (limonite and hematite).

3 Excluding the patented ground, the El rame claims cover approximately 700
4 acres. Copper minerals are found on all of the claims. Core drilling may or
5 may not disclose the existence of under-lying ore-bodies.

6 Melluzzo states that if he is not able to reach an agreement with the Flood
7 Control District he will bring in his own drill and put down some test holes.
8 If he does this and if he is lucky enough to find a mineralized zone at any
9 reasonable depth, the price of the claims can skyrocket to several million dollars.
10 Even if no ore-bodies are found, evaluation and acquisition can only be accompli-
11 shed through court action, and this process could drag out for years. The
12 Melluzzos have a lawyer, Hale Tognoni, who is not only a lawyer, with years of
13 experience in similar cases ,but is a Registered Professional Mining Engineer
14 and Geologist of note.

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