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# COMMON VARIETIES ACT AMENDMENT

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## HEARING BEFORE THE SUBCOMMITTEE ON MINERALS, MATERIALS, AND FUELS OF THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS UNITED STATES SENATE EIGHTY-NINTH CONGRESS

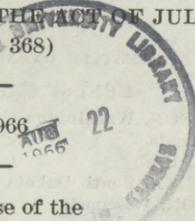
SECOND SESSION

ON

S. 2281 and S. 3485

BILLS TO AMEND SECTION 3 OF THE ACT OF JULY 23, 1955  
(69 STAT. 367, 368)

JUNE 28, 1966



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# CONTENTS

	Page
S. 2281-----	2
S. 3485-----	4
Departmental reports:	
Agriculture-----	4
Interior-----	7

## STATEMENTS

Ahern, John B., vice president, Montana Travertine Quarries, Gardiner Mont-----	51
Bible, Hon. Alan, a U.S. Senator from the State of Nevada-----	22
Cannon, Hon. Howard W., a U.S. Senator from the State of Nevada-----	9
Cavanaugh, Thomas J., Acting Solicitor, Department of the Interior, accompanied by Ernest F. Hom, Assistant Solicitor for Land Appeals, and David B. Finnegan, Legislative Counsel's Office-----	23
Greeley, Arthur W., Associate Chief, Forest Service, Department of Agriculture, accompanied by Reynolds G. Florance, Director, Division of Legislative Reporting and Liaison-----	33
Henderson, J. R., president, Las Vegas Building Materials, Inc., accompanied by Vincent B. Ahern, Jr., assistant managing director, National Sand & Gravel Association-----	61
Kessler, William, Arizona Gypsum Corp-----	72
Larison, L. H., president, American Chemet Corp. of Helena, Mont-----	20
Loneragan, John B., attorney for various mineral interests-----	42
Matson, Robert E., geologist, Montana State Planning Board-----	19
Metcalf, Hon. Lee, a U.S. Senator from the State of Montana-----	14
Roth, Urban L., Mining Association of Montana-----	54
Sahinen, Uno M., associate director, Montana Bureau of Mines and Geology-----	19
Shields, Dr. Donald K., Brea, Calif-----	71
Snell, Thaddeus S., on behalf of the Gypsum Association-----	66

## COMMUNICATIONS

Anderson, McKinley, Bozeman, Mont., letter to Stewart French, chief counsel, Interior and Insular Affairs Committee containing a letter to Hon. Ernest Gruening, U.S. Senate-----	84
Cannon, Hon. Howard, a U.S. Senator from the State of Nevada, letter to Hon. Ernest Gruening, chairman, Minerals, Materials, and Fuels Subcommittee, containing a copy of a letter sent to Acting Solicitor Thomas Cavanaugh-----	81
Caplan, Max, Bureau of Land Management, letter to Mr. George W. Nilsson, Los Angeles, Calif., dated October 11, 1957-----	53
Carter, William L., executive director, National Crushed Stone Association, letter to Hon. Ernest Gruening, chairman, Minerals, Materials, and Fuels Subcommittee, dated July 9, 1966-----	83
Cavanaugh, Thomas J., Associate Solicitor for Public Lands, letter to Hon. Howard W. Cannon, U.S. Senate, dated July 5, 1966-----	82
Clapper, Louis S., National Wildlife Federation, letter to Hon. Ernest Gruening, chairman, Minerals, Materials, and Fuels Subcommittee, dated June 28, 1966-----	76
Cowan, Joseph E., Canon City, Colo., letter to Hon. Gordon Allott, U.S. Senate, dated January 3, 1965-----	28
Cutter, D. W., Forest Service, Albuquerque, N. Mex., memorandum to Richard C. Smith, regional forester-----	76

Gemmill, Paul, Nevada Mining Association, letter to Hon. Ernest Gruening, chairman, Minerals, Materials, and Fuels Subcommittee, dated June 23, 1966-----	Page 21
Gruening, Hon. Ernest, chairman, Minerals, Materials, and Fuels Subcommittee, letter to Louis S. Clapper, National Wildlife Federation, dated July 5, 1966-----	78
Hand, William W., Dillon, Mont., letter to Hon. Lee Metcalf, U.S. Senate, dated June 23, 1966-----	21
Hoffman, L. E., Bureau of Land Management, letter to Chad F. Calhoun, vice president, Kaiser Steel Corp., dated February 28, 1957-----	53
Lovick, E. D., W. R. Grace & Co., letter to Hon. Lee Metcalf, U.S. Senate, dated June 23, 1966-----	21
Maloney, W. G., secretary-manager, Mining Association of Montana, letter to Hon. Ernest Gruening, chairman, Minerals, Materials, and Fuels Subcommittee, dated June 24, 1966-----	20
Puckett, Lowell M., State director, Bureau of Land Management, letter to David Cowan, Canon City, Colo., dated December 17, 1964-----	31
Rogers, Norman, Helena, Mont., letter to Hon. Lee Metcalf, U.S. Senate, dated June 25, 1966-----	22
Smith, E. D., U.S. Borax, letter to Hon. Howard W. Cannon, U.S. Senate, dated December 21, 1965-----	79
Stoddard, Charles H., Director, Bureau of Land Management, letter to Edward P. Cliff, Chief, Forest Service, Department of Agriculture-----	75

## ADDITIONAL INFORMATION

Department of the Interior, Bureau of Land Management, memorandum of December 17, 1964-----	29
Ninth Circuit Court of Appeals decision in the case of <i>Alfred Coleman and Edward J. McClennan, appellants v. United States of America</i> -----	89

## COMMON VARIETIES ACT AMENDMENTS

TUESDAY, JUNE 28, 1966

U.S. SENATE,  
SUBCOMMITTEE ON MINERALS, MATERIALS, AND FUELS  
OF THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,  
Washington, D.C.

The subcommittee met, pursuant to call, at 10 a.m., in room 3110, New Senate Office Building, Senator Ernest Gruening (chairman of the subcommittee) presiding.

Present: Senators Gruening, Moss, Nelson, Metcalf, Allott, Jordan, Simpson, and Fannin.

Also present: Senator Cannon.

Staff present: Jerry T. Verkler, staff director; Stewart French, chief counsel, and E. Lewis Reid, minority counsel.

Senator GRUENING. The hearing will please come to order.

This is an open hearing by the Subcommittee on Minerals, Materials, and Fuels of the Interior Committee on proposed legislation pending before it. The most far reaching of the bills before the subcommittee at this time involves the administration of the so-called Common Varieties Act, which is Public Law 167, 84th Congress, found in title 30, United States Code, beginning with section 601.

The Common Varieties Act was passed in July of 1955 primarily to prevent abuses of the mining laws, particularly in our national forests. It was sponsored in the 84th Congress by Senator Anderson of New Mexico who had been Secretary of Agriculture under President Truman.

At the hearings in May 1955, on Senator Anderson's bill S. 1713, it was brought out that the mining laws were being used by persons, who for the most part were not miners, to obtain title to hundreds of thousands of acres of valuable timber belonging to the people of the United States at no cost to themselves, and subject to little or no control by the Forest Service. The infamous *Al Sarena* case is a glaring example.

Also, mining claims were being used as a means of obtaining rent-free and cost-free tracts of land belonging to the people of the United States for taverns, motels, and other commercial enterprises which bore no relationship to mining.

It was to correct such situations that the Common Varieties Act was enacted.

The Interior Committee's report on the measure, after setting forth the purposes and needs for the legislation, specifically states:

At the same time, the measure faithfully safeguards all of the rights and interests of bona fide prospectors and mine operators. In no way would it deprive them of rights and means for development of the mineral resources of the public lands of the United States under the historic principles of free enterprise and private ownership of the present mining laws. (S. Rept. 554, 84th Cong.)

Certainly the objectives of Public Law 167 as enacted, and with the congressional intent as set forth in the quoted paragraph, were praiseworthy, and unquestionably the measure, within the framework of the purposes, intent, and safeguards for legitimate mining, was necessary at that time.

Unfortunately, of late years the Departments of the Interior and Agriculture have interpreted and administered this law so narrowly and in such a bureaucratic manner that legitimate mineral development on the publicly owned lands has been adversely affected, and rights of bona fide mining men jeopardized. So widespread became the complaints of citizens against the interpretation and administration of this law that the subcommittee, aided by the distinguished and able junior Senator from Montana, Lee Metcalf, a valued member of the Interior Committee, went to Butte, Mont., last June and held hearings. Subsequently, the views of the executive agencies were sought at hearings in Washington.

These hearings have been published under the title "Common Varieties Act," and without objection I will direct that they be incorporated, by reference, into these hearings.

Two bills designed to remedy the situation are the subject of our hearing this morning. They are S. 2281, sponsored by the able junior Senator from Nevada, Mr. Cannon, for himself and Senators Bible, Moss, Simpson, and Bennett, and S. 3485, sponsored by Senator Metcalf and me.

I will direct that the text of these measures, together with the reports of the executive agencies, be made a part of this hearing record at this point.

(The data referred to follows:)

[S. 2281, 89th Cong., 1st sess.]

A BILL To amend section 3 of the Act of July 23, 1955 (69 Stat. 367, 368), and to authorize mining locations for certain mineral deposits

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Act of July 23, 1955 (69 Stat. 367), as amended (30 U.S.C. 601-615), is amended by:

(a) Deleting in section 3 thereof the penultimate sentence and substituting therefor the following: "'Common varieties' as used in this Act does not include (1) deposits of such materials which are valuable because the deposit has some property giving it distinct and special value; (2) so-called block pumice which occurs in nature in pieces having one dimension of two inches or more; (3) limestone suitable for use in the production of cement, metallurgical or chemical grade limestone and gypsum; and (4) sand, gravel, and rock for use as aggregates in the manufacture of concrete or for other construction purposes. Subject to valid existing rights, the minerals of the classes described in clauses (1), (2), (3), and (4) shall hereafter be subject to location and patenting under the United States mining laws, as those laws are amended with respect to these minerals by section 3A of this Act; valid existing mining claims for those classes of minerals may be maintained only in conformity with section 3A of this Act."

(b) Adding a new section reading as follows:

"SEC. 3A. Mining claims located after the effective date of this section and patents issued pursuant to such claims and mining claims existent on the effective date of this section for the classes of minerals described in clauses (1), (2), (3), and (4) of section 3 shall be subject to the following requirements and conditions:

"(a) The owner of any unpatented mining claim for which application for patent is not on file with the Secretary of the Interior on the effective date of this section shall file with the Secretary of the Interior a statement setting forth the name of the claim, the names and addresses, if known, of all persons claim-

ing an interest in the mining claim, the description of the lands so claimed as they are described in the location certificate and as they are identified in accordance with the current official plats of survey, if the land is surveyed, and the book and page of the local record of such location certificate, and of any amendments thereto. If the mining claim is situated on unsurveyed land, the statement shall (1) describe the situs of the mining claim by metes and bounds and with a connection by course and distance to (i) the nearest public land survey corner or United States mineral monument, or (ii) at least two permanent and prominent natural objects or monuments; and (2) be supplemented by such further description, map, plat, or survey as the Secretary of the Interior may request in order to identify the land with a reasonable degree of accuracy, and the supplemental data shall be filed within ninety days after request by the Secretary therefor. Statements pertaining to claims located prior to the effective date of this subsection shall be filed within ninety days from and after the date of location of the claim. Failure to file such statement, or such further identification data as the Secretary may require, within the prescribed period shall terminate any right, title, or interest which the owner may have by virtue of such mining claim without further action or proceedings and all right, title, and interest which he may have shall revert to the United States. Failure to file further identification data shall be noted on the records of the Secretary of the Interior.

“(b) Expenditures incurred in surveying and in the preparation of maps or plats or similar identification data to comply with the requirements of subsection (a) of this section may be used toward assessment work for the assessment year in which performed or the succeeding assessment year. Within ninety days after the expiration of each and every annual assessment year, the owner of a mining claim for which statements are filed with the Secretary of the Interior pursuant to subsection (a) of this section shall file with the Secretary of the Interior a statement that the assessment has been performed for the benefit of the claim within that assessment year. Failure to file such statement for two consecutive assessment years, unless excused for good cause by the Secretary of the Interior upon a petition filed within that period, shall terminate any right, title, and interest which the owner may have by virtue of any such mining claim located after the effective date of this Act without further action or proceedings and all right, title, and interest which he may have shall revert to the United States. Appropriate notations of such termination shall be noted on the records of the Secretary of the Interior.

“(c) Compliance with subsections (a) and (b) of this section shall create no presumption as to the validity of any mining claim.

“(d) Within sixty days after the effective date of this section, the Secretary of the Interior shall cause to be published in the Federal Register a notice setting forth the requirements of this section. Within that period, the Secretary shall also cause notices of the requirements of this section to be published in such newspapers, posted in such public offices, and given publicity by such other means, as he deems feasible and appropriate for the dissemination of information concerning this section.

“(e) Prior to the commencement of mining operations on any mining claim located after the effective date of this section, there shall be filed with the Secretary of the Interior a good and sufficient bond or undertaking shall be relieved of his obligation thereunder upon the patenting of the mining claim or the restoration of the land to a condition satisfactory to the Secretary.

“(f) The owner of any unpatented claim, located after the effective date of this section, shall file with the Secretary of the Interior an application for patent within three years from the date of location. Failure to file such application within the prescribed period shall terminate any right, title, or interest which the owner may have by virtue of such mining claim without further action or proceedings and all right, title, and interest which he may have shall revert to the United States.

“(g) No mining claim shall hereafter be located if the land, prior to the date of location, (1) has not been classified by the Secretary of the Interior as proper for such use and disposal; and (2) has been zoned against such use by competent State or local authority.

“(h) Title to lands patented under this section based upon mining claims hereafter located, shall revert to the United States if (1) within five years of the date of patent the owner has not, by substantial mining operations, demonstrated to the satisfaction of the Secretary a devotion of the land to the production of mineral materials, or (2) within twenty-five years from the date

of patent and prior to the removal of all of the mineral material which may be economically extracted, the lands are devoted, without the prior consent of the Secretary, to any use other than mining or processing operations and uses reasonably incident thereto.

"(i) Notwithstanding any other provision of law, patent for any mining claim located after the effective date of this section shall be issued only after payment to the Secretary by the claimant of the fair market value of the surface estate only, as that value is determined as of the date application for patent is filed.

"(j) The owner of any unpatented mining claim, located prior to the effective date of this section, may elect to make his claim subject to the provisions of this section in such manner as may be prescribed by the Secretary."

Sec. 2. The Secretary of the Interior is authorized to make such rules and regulations as he deems appropriate for the purpose of administering this Act.

Sec. 3. This Act may be cited as the "Mining Law Revision Act of 1965."

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[S. 3485, 89th Cong., 2d sess.]

A BILL To amend section 3 of the Act of July 23, 1955 (ch. 375, 69 Stat. 368)

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section 3 of the Act of July 23, 1955 (ch. 375, 69 Stat. 368), is amended to read:

"No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders, and no deposit of petrified wood, shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claims hereafter located under such mining laws: *Provided, however*, That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. 'Common varieties' as used in this Act shall not include deposits of such materials which have some chemical, physical, or chemical and physical, property or properties (other than lack or presence of physical properties of mere weight, volume, or strength), making them valuable mineral deposits under such mining laws. Use or usefulness for a common purpose or application shall not classify a material as a common variety. 'Common varieties' as used in this Act shall not include, among others: (1) limestones suitable for use in the production of cement lime, extenders or fillers, or metallurgical or chemical grade limestones, gypsum, talc, and the like, whether or not any such material may require treatment, beneficiation or additives; (2) travertine, marble, limestones, granites, or gabbros, suitable for use with or without shaping or sizing in the commercial construction of exposed portions of buildings, or suitable for high polishing or accurate shaping for monument, building plate, or surface plate purposes, or so-called block pumice which occurs in nature in pieces having one dimension of two inches or more; or (3) any material considered as concrete aggregate which will meet Federal or State or other government concrete aggregate specifications, with or without treatment or beneficiation. 'Common varieties' as used in this Act shall include, among others, deposits of sand, stone, gravel, pumice, pumicite, and cinders valuable and suitable for use only as fill, or as riprap, road base, or any other purpose where only lack or presence of the physical properties of mere weight, volume, or strength, is required. 'Petrified wood' as used in this Act means agatized, opalized, petrified, or silicious wood, or any other material formed by replacement of wood by silica or other matter. Terms used in this Act shall be understood and applied in the meaning they have in commerce and the construction and mining industries. Nothing contained in this Act shall be construed as relieving a claimant from any other requirements of the mining laws of the United States."

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DEPARTMENT OF AGRICULTURE,  
Washington, D.C., June 28, 1966.

HON. HENRY M. JACKSON,  
Chairman, Committee on Interior and Insular Affairs,  
U.S. Senate.

DEAR MR. CHAIRMAN: As you requested, here is our report on S. 3485, a bill "To amend section 3 of the Act of July 23, 1955 (ch. 375, 69 Stat. 368)," and S. 2281,

a bill "To amend section 3 of the Act of July 23, 1955 (69 Stat. 367, 368), and to authorize mining locations for certain mineral deposits."

We recommend that S. 2281 and S. 3485 not be enacted in their present form.

The Act of July 23, 1955, as amended (30 U.S.C. 611), is commonly known as the Multiple Use Mining Act. This Act defined the rights which locators and the United States would have on mining claims located after July 23, 1955, the date of the Act. It provided that common varieties of sand, stone, gravel, and certain other mineral substances would not thereafter be deemed valuable minerals for purposes of locations under the mining laws. Under the Act, these common varieties are disposed of under lease or permit arrangements.

S. 3485 and subsection 1(a) of S. 2281 would amend section 3 of the Multiple Use Mining Act by redefining the "common variety" category. The Act presently excludes from that category: (1) deposits of such materials which are valuable because the deposit has some property giving it distinct and special value; and (2) so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more.

In addition to these presently excluded materials, S. 2281 would exclude: (1) limestone suitable for use in the production of cement; (2) metallurgical or chemical grade limestone and gypsum; and (3) sand, gravel, and rock for use as aggregates in the manufacture of concrete or for other construction purposes. Subject to valid existing rights, these materials would be permitted to be located and patented under the United States mining laws, as they would be amended by the bill.

S. 3485 would exclude from the common variety category the following: (1) limestones suitable for use in the production of cement, lime, extenders or fillers, or metallurgical or chemical grade limestones, gypsum, talc, and the like; whether or not any such material may require treatment, beneficiation or additives; (2) travertine, marble, limestones, granites, or gabbros, suitable for use with or without shaping or sizing in the commercial construction of exposed portions of buildings, or suitable for high polishing or accurate shaping for monument, building plate, or surface plate purposes, or so-called block pumice which occurs in nature in pieces having one dimension of two inches or more; or (3) any material considered as concrete aggregate which will meet Federal or State or other government concrete aggregate specifications, with or without treatment or beneficiation.

S. 3485 would exclude from the common variety category the following: (1) gravel, pumice, pumicite, and cinders valuable and suitable for use only as fill, or as riprap, road base, or any other purpose where only lack or presence of the physical properties of mere weight, volume, or strength, is required. The bill would direct that the terms used therein would be understood and applied in the meaning they have in commerce and the construction and mining industries.

The Multiple Use Mining Act has produced many beneficial results and, in general, we have looked upon it as extremely good. The problems in following and administering it have arisen mainly in connection with the provisions on common varieties.

We believe the congressional committees, the Executive departments, and the private industry representatives that considered and supported the Multiple Use Mining Act felt that the common variety provisions could be applied with little difficulty. Experience has been otherwise.

S. 2281 and S. 3485 would approach the "common varieties" problem by clarifying the term through statutory amendment. S. 3485 would spell out new guidelines for classification. Both bills would specifically exclude from the common variety category or include in it certain substances which have been found difficult to classify under the present statutory definition.

Although S. 2281 and S. 3485 might solve some present problems and narrow the area of uncertainty, their approach would probably not be a permanent cure. A "common variety" will always be difficult, if not impossible, to define. Claimants under the mining laws would still have to risk contests when the substances they mine are on the borderline of a category defined by statute. Administrative decisions interpreting and further defining the statutory definition would still be necessary and would still result in a degree of uncertainty.

S. 2281 and S. 3485 would have the effect of narrowing the scope of the "common variety" category. The bills would thereby increase the number and types of materials which would be locatable under the mining laws.

We feel that such a narrowing of the "common variety" category would be a step backward from the gains realized through enactment of the Multiple Use Mining Act. One of the principal purposes of that Act was to protect and insure

multiple use of both the surface and subsurface resources on Federal lands. The removal of common varieties of sand, gravel, stone, rock, and other materials from location under the mining laws was considered essential to minimize conflicts between mining and the use of valuable surface resources.

The Act recognized that many common varieties, such as sand and gravel for aggregate, have a marketable value. It provided for realization of the value through a sales procedure. In this way, the disposing agency is able to protect the values of the surface resources which would be affected.

One of the principal areas of difficulty was revealed at the recent hearings held by your Subcommittee on Minerals, Materials, and Fuels on the interpretation and administration of the Multiple Use Mining Act. This involves the uncertain application of the statutory term "common varieties" to mining claims on areas containing substances which are primarily valuable for use as building material. Such claims are often made in good faith with the belief that the substances involved are not common varieties and are therefore locatable under the mining laws. The locators undertake mining operations in reliance on this belief.

Problems arise when the claims are contested as being for common varieties, and therefore invalid under the mining laws. The locator is faced with costly and lengthy contest proceedings. He is uncertain as to where he stands in any operation of the claim while the proceeding is pending. Then, if his claim is determined to be invalid, he may be required to pay for all material removed and for the cost of surface restoration.

Information reaching us indicates that many locators with whom our people have discussed this matter would be willing to apply for and obtain a lease for the removal of the material if satisfactory procedures could be set up for the issuance of such leases. In most cases the locator has, through his own efforts discovered the deposit. But under the present laws, if he undertakes to apply for a lease to remove the material, he can, with a few exceptions, obtain such a lease only through the competitive bidding process. He has no advantage because of the work he did in making the discovery and developing a market for the material.

There is much uncertainty as to the application of the present common variety provisions. Experience to date has shown that most of the contested claims for building materials have been determined to be invalid. Our experience also has been that there is a long lag before a final determination is made. These uncertainties could be removed and locators could be assured of leasing the deposits they have discovered through provisions which would (1) remove from location under the mining laws, all forms of sand, stone, rock, gravel, cinders, pumice, materials which have their primary value through use for building materials, and certain other non-metallic materials the primary use value of which does not depend on its chemical properties but on the use to which it is put; (2) abolish the distinction between common and uncommon varieties of these materials; and (3) provide for their disposal through a leasing arrangement.

Provision could be made for prospecting permits, and the prospector could have a priority for issuance of a lease upon making a discovery. Leases could be issued for a sufficiently long period to allow recovery of initial costs and could provide for noncompetitive renewals and expansions. Fees under leases would be for the value in place of the substance removed.

Provision could be made for issuing leases to those persons who on the date of enactment had made good faith locations. Or if such persons choose not to apply for a lease, they could rely upon their confidence in the validity of their location under the present provisions of the mining laws.

We realize that questions of this kind fall within the scope of the Public Land Law Review Commission studies. However, provisions along these lines could give needed assurance to operators, eliminate unnecessary frictions and burdens to operators and Government people, and enable the Government to give proper management to surface resources.

Subsection 1(b) of S. 2281 contains a group of provisions which would require recordation of certain mining claims.

The Secretary of the Interior, in June 1965, forwarded to Congress a proposed bill to provide for the recordation of mining claims. That proposal was introduced as S. 2248, and is in many respects similar to the recordation provisions of S. 2281. We join with the Secretary of the Interior in this proposal and recommend that S. 2248 be considered by your committee in lieu of the recordation provisions of S. 2281.

With respect to mining claims located after its effective date, subsection 1(d) of S. 2281 would also provide for: (1) filing of a required land restoration bond prior to commencement of mining operations; (2) a required filing of an application for patent within three years from the date of location; (3) a prohibition on the location of mining claims unless the land has been classified for such use by the Secretary of the Interior and has not been zoned against such use by competent State or local authority; (4) reversion of title to the United States of patented lands which, in certain instances, are not used for mining purposes; (5) payment by claimants of the fair market value of the surface estate before a patent is issued; and (6) a possible election by owners of unpatented mining claims located prior to the effective date of the bill to be bound by its provisions.

These provisions would effect major substantive changes in the procedures and administration of location and patent of mining claims. We recommend that consideration of these changes be delayed pending completion of the study by the Public Land Law Review Commission.

The Bureau of the Budget has advised that time considerations have not permitted a determination as to the relationship of this report to the program of the President.

Sincerely yours,

ORVILLE L. FREEMAN, *Secretary.*

DEPARTMENT OF THE INTERIOR,  
OFFICE OF THE SECRETARY,  
Washington, D.C., June 28, 1966.

HON. HENRY M. JACKSON,  
*Chairman, Committee on Interior and Insular Affairs,*  
*U.S. Senate, Washington, D.C.*

DEAR SENATOR JACKSON: Your Committee has requested the views of this Department on S. 2281, a bill "To amend section 3 of the Act of July 23, 1955 (69 Stat. 367, 368), and to authorize mining locations for certain mineral deposits," and S. 3485, a similar bill.

Both bills amend section 3 of the Act of July 23, 1955 (69 Stat. 368), as amended (30 U.S.C. 611). S. 2281 also adds a new section to that Act.

Within the last few days, your Committee has requested our report on S. 3485 which has only recently been introduced. We believe it may have some provisions which could be very helpful in administering the 1955 Act. We have not had adequate time, however, to consider these provisions. We therefore cannot now comment on that bill. We will provide your Committee with our report as soon as possible.

Subsection 1(a) of S. 2281 attempts to clarify the term "common varieties" by adding to the definition two new classes of uncommon varieties. These are: first, limestone suitable for use in the production of cement, metallurgical or chemical grade limestone, and gypsum; and second, sand and gravel and rock for use as aggregates in the manufacture of concrete or for other construction purposes, such as the construction of buildings and fill for highways, levees, jetties, and stream protection. The term "rock" is ambiguous. It could include stone.

Under existing law, this Department has by regulation determined that limestone suitable for use in the production of cement and metallurgical or chemical grade limestone is not a common variety (see 43 CFR 3511.1(b)). The term "suitable" as used in the regulation has been construed to mean "having properties giving distinct and special value". The effect of this section of the bill, therefore, is to write into statutory law the provision that is now in the regulation, and to add sand, gravel, and rock used for the purposes indicated to the minerals that are subject to location and patent. We would interpret the term "suitable" as used in the bill as having the same meaning as the regulation.

Experience has demonstrated that there is a need for legislation which will clarify the distinction between common and uncommon varieties. We believe, however, that the changes in the definition proposed by S. 2281 do not adequately overcome the problems that have consistently plagued the Department in administering the 1955 Act, and the public.

Historically, the United States mining laws have encouraged persons to prospect, explore, and develop the public lands of this country with the assurance of ownership of the minerals and lands so developed. A person may enter upon the public lands that are not withdrawn from the operation of United States mining laws, locate a mining claim, explore its mineral potential, and, if discovery is

made, obtain a patent to the lands. The patented land belongs to the individual to do with as he pleases.

Prior to 1955, it became evident both to the Congress and the executive branch that some persons located mining claims on the public lands for purposes that did not include mining. The effect of this activity was a perversion of the mining laws and, in some cases, a loss of the surface resources on the lands within these claims. In some cases, such activities resulted in increased management costs of the adjacent lands or made them inaccessible.

In 1955, Congress made common varieties of sand, stone, gravel, pumice, pumicite, and cinders, subject to disposal under the Materials Act, and removed them from the scope of the mining laws. It also gave the Secretary of Agriculture the same authority with respect to mineral materials and vegetative materials on lands administered by him as the Secretary of the Interior has with regard to lands under his jurisdiction.

The meaning of the term "common varieties" has been a constant source of trouble since then.

There are at least three possible alternative approaches to this problem.

First, we could go back to the pre-1955 Act situation and make all of these substances again subject to the mining laws. We believe this approach is highly undesirable, and would be a step backward.

Second, we could (1) delete the distinction between common and uncommon varieties, and (2) make all sand, stone, gravel, pumicite, cinders, clay, petrified wood, and, with some exceptions, pumice, subject to disposition under the Materials Act, as amended. We favor this approach, but we reserve final judgment until we have had an opportunity to consider S. 3485. In order to carry out this approach, subsection 1(a) of S. 2281 should be amended to read as follows:

"(a) Section 3 of that Act is amended to read as follows:

"Sec. 3. Subject to valid existing rights, no deposit of sand, stone, gravel, pumice (other than 'block pumice' which occurs in nature in pieces having one dimension of two inches or more), pumicite, clay, cinders, or petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States: *Provided*, That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. 'Petrified wood' as used in this Act means agatized, opalized, petrified, or silicified wood, or any material formed by the replacement of wood by silica or other matter.'"

Also, on lines 18 and 19 of page 2 of S. 2281, delete "clauses (1), (2), (3), and (4) of".

This provision would make these substances subject to disposition by sale under the Materials Act, as amended. We understand that the Department of Agriculture has recommended the leasing of all deposits of the named minerals. Both approaches are workable, but we prefer the sale of the minerals.

Third, we could try the approach taken in S. 3485—that is, clarify the term "common varieties" by specific exclusions and inclusions.

Subsection 1(b) of S. 2281 makes some general changes in the mining law which we favor. It adds a new section 3A to the 1955 Act, and subjects to a series of conditions (1) mining claims located after this new section is enacted, (2) patents issued pursuant to such claims, and (3) mining claims in existence on this new section's effective date. They apply only to the four classes of minerals mentioned in section 1(a).

If your Committee adopts our amendment to section 1(a) of S. 2281, these provisions in section 1(b) would be unnecessary because these minerals will not be subject to location under the mining laws.

The Bureau of the Budget has advised that time considerations have not permitted a determination as to the relationship of this report to the program of the President.

Sincerely yours,

FRANK J. BARRY, *Solicitor*.

Senator GRUENING. The subcommittee is fortunate in having with it this morning Senator Cannon, of Nevada, who is recognized as one of the most knowledgeable Members of the Congress with respect to mineral laws and mineral industry problem. Senator Cannon, please come forward and sit at the committee table.

STATEMENT OF HON. HOWARD W. CANNON, A U.S. SENATOR FROM  
THE STATE OF NEVADA

Senator CANNON. Thank you, Mr. Chairman. I am most appreciative of the opportunity to testify today on a matter that has been of great concern to many Senators; the problem of developing meaningful and workable solutions to problems connected with the administration of Public Law 167 of the 84th Congress. The problem involves the so-called common varieties of minerals: sand, gravel, stone, and other related minerals.

Public Law 167, a law with which the distinguished chairman of this subcommittee and many other western Senators are very familiar, provided that "common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws."

The purpose of Public Law 167 apparently was to preclude the possibility of unauthorized or fraudulent locations by speculators who had no intention of developing mining operations, but were interested only in gaining title to surface land.

This is a sound and wise purpose, but the interpretation of the law by the Interior Department has been unrealistic and has resulted in grave problems in that the Interior Department has acknowledged no difference between common and special or uncommon varieties of sand, gravel, building stone, and other building materials.

As I pointed out last year when I introduced S. 2281, the Department of the Interior has consistently held in recent years that all sand and gravel and similar deposits are of a common variety—an interpretation that excludes all special varieties of building materials from location under the mining laws. The interpretation also fails to consider or recognize the type of materials needed by the construction industry.

Moreover, Mr. Chairman, the adoption of this position by the Interior Department, in my opinion, clearly ignores the intent of Congress at the time it passed Public Law 167.

If the purpose of the law would have been to eliminate all varieties, the language of the act would have so stated. The Congress, however, specifically added the word "common" to make it clear that only common varieties would be excluded, leaving the special varieties of building materials subject to the mining laws.

The distinguished chairman of the subcommittee took this same position in a recent letter to Secretary Udall. The chairman made a copy of the letter available to me, and I was most impressed with his definition of the problems encountered in the administration of Public Law 167.

The chairman noted that the law contemplated that some varieties of these deposits would be subject to location, being designated as an uncommon variety.

The chairman also outlined two other areas of serious difficulty:

1. The lines of cases in which the Solicitor has redefined and modified the "prudent man" test of discovery has led to instability in the mining industry and to criticism of the unreliability of departmental policy.

2. The seemingly arbitrary and capricious method in which mining claims have been contested and frequently invalidated is an extremely disturbing source of constant discontent in the mining industry.

With regard to the firm conviction of many of us that Congress intended that special varieties of sand, gravel, and similar minerals should be subject to location, it should be pointed out that in 1965 the sand, gravel, and crushed stone industries produced 880 million tons valued at \$910 million.

These figures should make it obvious that not all sand and gravel deposits are "common" and have no value. Special varieties are valuable resources and are essential to our economy.

I also think it is important to note that the American Society of Planning Officials estimates that some 42 billion tons of special-purpose sand and gravel will have to be produced within the next 30 years to meet construction needs of this country.

We recognize that a serious problem exists in that the Interior Department is refusing to validate any special variety claim. There are two ways to meet this problem and clarify the intent of Congress.

One way is to prevail upon the Interior Department to administer Public Law 167 in such a manner as to recognize the existence of deposits of special varieties of sand, gravel, and related minerals, and to validate their location. Efforts so far to do this have failed. In fact, on March 11, 1964, John Carver, then Assistant Secretary of the Interior, referred to the "inability" of the Department "to arrive at a working definition of 'common varieties' which is acceptable both to industry and administration."

The second way to meet the problem is through clarifying legislation.

S. 3485, introduced by the distinguished chairman, Senator Gruening, and Senator Metcalf, goes a long way toward solving the problem and I certainly endorse its objectives.

It provides a clear description of what constitutes a special variety of sand, gravel, building stone, and other mineral deposits. It recognizes that the building industry desperately needs certain, special, high-quality deposits of sand and gravel and other minerals for use as aggregates or for other bona fide building and construction uses.

James Henderson, who will testify today in behalf of the sand and gravel industry, summed up the industry's problem in a recent issue of "Rock Products," when he said:

I believe the major problem the sand and gravel industry faces \* \* \* springs from a basic confusion as to what sand and gravel is. To the layman \* \* \* it is just a common substance that exists everywhere. People do not understand that the specifications for any kind of concrete aggregate utilized under engineering requirements are growing continuously more rigid.

It is also pointed out in "Rock Products" that supplies of special, high-quality sand and gravel are growing scarce near booming urban areas and that the Government owns a large percentage of the land in the Western States—about 87 percent in my State of Nevada.

S. 3485 outlines what materials are not to be considered "common" varieties, including limestones suitable for use in the production of cement, lime, extenders or filters, or metallurgical or chemical-grade limestones, gypsum, talc, and the like; travertine, marble, limestones, granites, or gabbros, suitable for use with or without shaping or sizing the commercial construction of exposed portions of buildings or suit-

able for high polishing or accurate shaping for monument, building plate, or surface plate purposes, or so-called block pumice, which occurs in nature in pieces having one dimension of 2 inches or more; or any material considered as concrete aggregate which will meet Federal or State or other government concrete aggregate specifications, with or without treatment or beneficiation.

These provisions should eliminate the need for uncertainty and any subjective judgments in the administration of the legislation by the Interior Department.

The bill does not, however, address itself to a problem which has been of immense concern to the Interior Department and many other parties—the problem of the unscrupulous individual who will file on sand and gravel deposits for the purpose of obtaining title to the land, so he can convert the land to uses other than mining.

Because of the reasonably widespread occurrence of sand, gravel, and other building materials, compared with other valuable mineral deposits, many persons—including officials of the Department of Interior—have expressed an interest in insuring that land on which sand and gravel claims are located and validated should, in fact, be devoted to mining purposes. Perhaps the description of special varieties in S. 3485 makes such assurances unnecessary. Perhaps, because of subjective judgments on marketability and other factors, provisions are needed. I know the committee will give this matter its most thorough consideration.

It is conceivable that a deposit of sand, gravel, or other material might be claimed near an urban area, purchased for a very small price, and then immediately developed for purposes entirely foreign to mining.

I have introduced a bill, S. 2281, which is designed to recognize that the intent of Congress, when it passed Public Law 167, was to allow the locations of special varieties, and at the same time to protect against fraudulent and speculative locations.

I introduced the bill as a vehicle for debate.

I am anxious for the committee to discuss, criticize, and improve the bill. I am well aware that there has been criticism of the bill from some quarters. Some mining organizations oppose the bill because they fear it might establish a precedent that would affect other operations.

I admit that my bill is unique. It is a unique approach to a unique problem. It would make sand, gravel, building stone, and similar special varieties used as aggregates in the manufacture of concrete or for other building purposes subject to the operation of the mining laws, provided that the claimant pay the fair market value of the surface estate; the owner demonstrates a devotion of the land to the production of mineral materials and not for purposes foreign to mining; that the lands revert to the United States if within 5 years within the date of patent the owner has not, by substantial mining operations, demonstrated to the satisfaction of the Secretary a devotion to mining, or within 25 years from the date of patent and prior to the removal of all the mineral materials which may be economically extracted the lands are devoted, without the prior consent of the Secretary, to any use other than mining or processing operations and uses reasonably incident thereto.

The bill also includes provisions for land classification prior to location and that the land may not be developed for mining purposes if such purposes are inconsistent with local zoning. Since gypsum and limestone are excepted from present definitions of "common varieties," I would offer an amendment to eliminate them from the provisions of S. 2281.

I was joined in sponsorship of S. 2281 by Senators Bible, Moss, and Simpson. I have not discussed the common-varieties problem with them since the introduction of S. 3485. I know, however, that they would support any effort to resolve a serious problem faced by sand and gravel operators who have been hard hit by the unrealistic administration of Public Law 167 by the Interior Department.

I do want to point out to the committee two printing errors in S. 2281. The first is in page 3 of the bill, beginning on line 17. It should read:

Statements pertaining to claims located on or after the effective date of this subsection shall be filed within ninety days from and after the date of location of the claim.

The second is on page 5, beginning on line 5. It should read:

Prior to the commencement of mining operations on any mining claim located after the effective date of this section, there shall be filed with the Secretary of the Interior a good and sufficient bond or undertaking to the United States in an amount fixed by the Secretary to assure adequate restoration of the surface, as determined by the Secretary. The person filing the bond on undertaking shall be relieved of his obligation thereunder upon the patenting of the mining claim or the restoration of the land to a condition satisfactory to the Secretary.

I support S. 3485 and am confident that its description of special varieties will be tremendously helpful in resolving an 11-year problem by clearly clarifying the intent of Congress.

Should it be decided by this committee that even with the description in S. 3485 of special variety locations for purposes of obtaining land for other-than-mining uses, I would respectfully suggest the full consideration of these provisions of S. 2281 which are designed to eliminate land speculation under the guise of special variety mineral location.

I know of no one in the Congress more knowledgeable in this area than the chairman of the committee, and I am encouraged about these hearings. I am hopeful that this is the first step toward prompt resolution of a matter of mutual concern, and I appreciate the opportunity to testify here today, Mr. Chairman.

I might add, it was rather interesting in our floor debate on the mine safety bill a few days ago, there was an attempt to remove sand and gravel from the implications or the effect of the Mine Safety Act, and this amendment was defeated. So, we now have a situation where the mine safety laws apply to a mine for sand and gravel, and yet the Department, on the other hand, says that you cannot have a mineral location for sand and gravel, and it seems to me that they are trying to carry water on both shoulders.

I thank you, Mr. Chairman. I would be happy to try to answer any questions.

Senator GRUENING. Senator Cannon, it would seem to be indicated that the best features of both these bills well might be combined. Then we could have a sort of wedding of these two pieces of legislation

and work out a bill that will satisfy the particular problem that your bill very properly raises and the other situation which Senator Metcalf's and my bill raises.

I think that can be worked out.

Senator CANNON. It would seem to me that it could, Mr. Chairman. I would say that I would wholeheartedly support your bill. I think that the administration's position, because of the abuses that did exist in the past, is that protective features are necessary. I would admit that the protective feature written into my bill is really a precedent, and it—

Senator GRUENING. It is very desirable.

Senator CANNON. It may not be the absolute answer, but I think that this committee could work out a satisfactory solution there if it were incorporated into your bill, to make it absolutely clear that we are not trying to help anybody here except a legitimate mine operator that wants to mine sand and gravel for use in the construction industry.

Senator GRUENING. Well, we had the example in the *Al Sarena* case of which your bill aims to prevent recurrence. I think your provisions are very desirable. Speaking for myself, I am hoping we can combine these two and attain the result that both bills desire.

Senator MOSS, do you wish to comment or question the witness?

Senator MOSS. I have no questions. Just by way of comment, I think it is a very fine presentation of the problem. I was happy to join Senator Cannon as a cosponsor of this bill. As you have observed, Mr. Chairman, we well could take in the best parts of both; certainly the thing we ought to do is provide against abuse but at the same time not throw the baby out with the bath water.

We should not eliminate entirely the ability of people to file and utilize the minerals of sand and gravel, the same as they do other hard minerals.

Senator GRUENING. I have no further questions at this time, but as we try to combine these two bills we would appreciate your cooperation.

Senator CANNON. I would be very happy to work with the committee, Mr. Chairman.

Senator GRUENING. Fine. Thank you very much.

I am happy to recognize at this time the very knowledgeable Senator from Montana, Senator Lee Metcalf, who surely is one of the best friends in Congress of our American mining and minerals industry. Senator Metcalf, although not a member of the Minerals, Materials, and Fuels Subcommittee—such are the vagaries of subcommittee assignment—has been of invaluable assistance to the subcommittee, especially at our field hearings in Butte last June.

Senator, we are hearing your and my bill, S. 3485, and have had the testimony of Senator Cannon on the related bill, S. 2281. The evidence so far indicates that there is considerable merit in both bills and possibly the two can be wedded and thus we will have the best features of each.

Senator Cannon's bill has as one of its specific purposes prevention of fraudulent use of the mining laws, such as we had in the *Al Sarena* case. I think this provision would be desirable without being inconsistent in any way with the legislation you have proposed.

Senator METCALF. Mr. Chairman, I would like to have my statement on S. 3485 put in the record, and then I will make some comments on it.

Senator GRUENING. If it is agreeable to you, I think it would be useful if you read the statement for the benefit of the executive agencies representatives and those of the industry.

#### STATEMENT OF HON. LEE METCALF, A U.S. SENATOR FROM THE STATE OF MONTANA

Senator METCALF. What we have here today is a problem that constantly plagues any legislative body. That problem is the gap that occurs between the adoption and the implementation of a law. No matter how carefully we select words intended to direct a governmental agency, the action taken by such agency often fails to correspond accurately with the legislative intent.

That is the case with the Common Varieties Act of 1955. The implementation of portions of that act has not, to my mind, followed the intent of Congress. As a result, hardships have been worked on certain legitimate interests and segments of society. S. 3485 should correct the situation by more precisely defining the action we wish carried out under the law.

The Common Varieties Act of 1955 itself was adopted with the idea of correcting abuses of the Federal mining laws, the basic statute of which went on the books in 1872. These laws permit anyone to go out on the public lands of the United States to look for minerals. If the explorer makes a discovery of a valuable mineral in place, the law permits him to "make a location" on the site of his discovery. The deposit he has discovered thereby becomes his property. He is allowed to develop it without going through the process of obtaining fee simple title, or he may become the owner of the land itself by complying with certain statutory requirements.

The mining law of 1872 and its subsequent additions played a major role in opening the West to the mining industry. But over time, abuses began to occur. As land became more scarce, more unscrupulous persons—persons with no interest in or knowledge of mining—used the law as a vehicle through which to obtain valuable tracts of public lands.

Spurious claims were filed as a subterfuge for the purpose of acquiring free land for summer homes, private hunting preserves, commercial enterprises or for surface values. Many people were making filings under color of the discovery of sand, stone, gravel, pumice, pumicite or cinders, all of these being minerals within the meaning of the Federal mining laws, and, Mr. Chairman, may I comment on Senator Cannon's statement at this point.

These are abuses that we intended to prevent when we passed the Common Varieties Act. I was a Member of the House of Representatives and participated enthusiastically in the passage of that legislation. The chairman of this subcommittee has mentioned the notorious *Al Sarena* case.

I can recall when we built Hungry Horse Dam, Mr. Chairman. There was only a little bit of land up through that steep and precipitous canyon. If somebody wanted to open up a bar or rooming

hours, they filed a mining claim and by the time they had it all litigated, the dam was built and they were off the property.

Collier's magazine, I remember, had a series of articles on the notorious abuses and it is not the intention of anyone of this committee to return to that sort of a situation, and if Senator Cannon's bill is better than S. 3485 in correcting the abuses, it certainly should be wedded to S. 3485 so that we are sure that we are not going back to the "bad old times" that we had before the passage of the Common Varieties Act.

But we must also remember that—may I skip down a paragraph.

Obviously, in acting to stop abuses of the mining laws, Congress desired in no way to impair the rights and activities of bona fide mineral prospectors and mining operators. Senate Report No. 544, which accompanied the Common Varieties Act, stated explicitly:

In no way would it deprive them (bona fide prospectors and mine operators) of rights and means for development of the mineral resources of the public lands of the United States under the historic principles of free enterprise and private ownership of the present mining laws.

I do not see how we can be any more explicit than that as to the legislative intent.

Unfortunately, the hope and intent expressed in this regard has been frustrated by the administration of the act. We have, in fact, interfered with the rights and interests of those who wish to make wholly proper use of the mining laws.

The Forest Service and the Bureau of Land Management have imposed standards, requirements, and tests not envisioned by supporters of the 1955 act. For example, in determining whether a mineral has a "distinct and special value," the Forest Service and BLM have applied a test of the "end use" to be made of the material.

Under this test, if a rare and valuable material such as travertine—a stone resembling fine Italian marble—is to be used to decorate the lobby of a building, it is considered to fall outside the law's exemption for material with "distinct and special value." The stone clearly possesses such value. But because its proposed use is common, the agencies have judged the stone itself to be a common variety within the meaning of the law.

Moreover, the Interior Department has chosen to apply an uncommon meaning of the word "common." Members of Congress, I believe, used that word in the act to mean types of stone found in abundance in a number of places. But the Interior Department has chosen to consider as "common" minerals which are common within their own category.

For example, neither travertine nor limestone is found in great quantity in a great number of location. But the Interior Department disregards that fact, and tests a particular deposit of travertine according to whether it is a common type of travertine, or a deposit of limestone according to whether it is a common type of limestone. Such a test kills what, in effect, are bona fide mining claims held by substantial mine operators for years and in which substantial sums have been invested in good faith.

Complaints about the narrow and excessively restrictive administration of the Common Varieties Act prompted this subcommittee last June to hold hearings on the problem, both in my home State of

Montana and in Washington under the chairmanship of the present chairman of the subcommittee. Numerous specific cases were described for the subcommittee showing how the law was producing results never intended by Congress.

S. 3485 should rectify the administration of the law.

It would provide that the use of a material for a common purpose shall not by itself form a test of whether the material is a "common variety" under the law.

And it would provide that "common varieties" shall not include certain specified classes of limestone, travertine, marble, granite, gabbros or concrete aggregate.

If I may resort to the word once more, the bill is responsive to the most common legitimate complaints about the administration of the Common Varieties Act. It should help us accomplish what we thought we were accomplishing in the first place.

Mr. Chairman, several individuals unable to testify in person at this hearing have submitted written statements and have asked that their views be entered in the record in this matter.

I would therefore respectfully request your permission to submit these materials for the record: Statement of Robert Matson, statement of L. H. Larison, a wire from Mr. Norman Rogers. All of those people testified at our hearing. There is also a statement from Uno Sahinen, a letter from E. D. Lovick, a letter from W. G. Maloney, and a letter from William M. Hand. Mr. Maloney represents the Mining Association of Montana.

May I read a couple of paragraphs from the statements?

Senator GRUENING. Please do. I will direct that the full text of the communications you have received as well as that of several addressed to me, appear in the record at the conclusion of the oral testimony.

Senator METCALF. One paragraph from the statement of Robert E. Matson, geologist with the Montana State Planning Board, reads:

I believe that the Departments of Interior and Agriculture in their interpretation of "common varieties" under Public Law 167 have discouraged exploration and development of new nonmetallic mineral deposits by requiring unrealistic lease arrangements and royalty payments. In addition, I believe that the decision of the Departments of Interior and Agriculture to classify any stone used for building purposes as "common variety" is completely arbitrary.

Then if I may read a further paragraph from the statement of Mr. L. H. Larison, who is the president of the American Chemet Corp. American Chemet mines, processes, and sells unusual stones such as arragonite-type onyx, black and gold marble, red granite, green quartzite, and black gabbro:

The black and gold marble is made into terrazzo chips and can also be sold as polished wall panels. This product is similar to one that is imported from Italy.

The black gabbro is located on public domain. It is mined and processed for use as exposed aggregate for buildings and is used in filtration beds in oil refineries. In this latter use it is superior to any other known mineral, and according to Uno M. Sahinen, associate director of the Montana Bureau of Mines and Geology, there is no other known deposit in the United States.

So you see, this arbitrary decision on the end use and the prudent man theory has resulted in the fact that very valuable and scarce stone products have been classified as common variety and as these miners of Montana and of other areas have said, has discouraged

development, discouraged exploration, and prevented the development of these new nonmetallic industries.

I was impressed when Senator Cannon pointed out that recently in this mine safety bill we said that part of the mine safety program was going to be the inspection of sand and gravel pits and quarries, and yet, on the other hand, we say in the Secretary of Interior's and in the Secretary of Agriculture's interpretation that these sand and gravel pits and quarries are not mines.

So, I think we should be consistent. I supported the inspection in the mine safety bill and I believe that we should permit these very valuable minerals which are not common at all to be locatable under the mining laws, as is traditional in the West.

Senator GRUENING. Thank you very much for a very effective statement, Senator Metcalf.

Senator Jordan, do you have any questions?

Senator JORDAN. No; I have no questions, only commendation to Senator Metcalf for a fine statement that would clarify and correct some abuses of which we are all aware.

Senator GRUENING. Senator Allott?

Senator ALLOTT. I have a couple, if I may.

Senator GRUENING. Please do.

Senator ALLOTT. I want to compliment you on your statement, Senator. I have a letter here I want to refer to in a moment. But I wonder if your statement would not apply equally well to a stone which we find in some places in Colorado called rhyolite.

I do not know whether you are acquainted with it or not. We will get the Department of Interior up here and get them to identify it. It is a very beautiful building stone, but it seems to me that it should come within the concept of this bill also.

Senator METCALF. We have not mentioned it in section 2.

Senator ALLOTT. You have not mentioned it and I did not know what bill was being considered when I came down here.

But, in this letter Mr. Joseph Cowan, of Canon City, Colo., refers to the quarrying of marble and travertine both and the new interpretation of the law which heretofore they had had under the minerals, and I think we intended it to when we passed the Common Varieties Act in 1955.

Senator METCALF. Not only did we intend to, but we admonished both the Secretaries of Agriculture and Interior that we intended to carry out the traditional intent of the mining law.

Senator ALLOTT. Let me read you a couple of paragraphs from Mr. Cowan's letter, because it is right along the line. It says:

Now we are anticipating of opening a new quarry in Garden Park District on Rocky Ridge. It is on open land—

That means he is referring, of course, to public land—

so we went to take it up as you used to do, found out the new land law has changed it so we cannot operate marble quarry under new regulations.

It takes at least five years for a small operation like ours to get into operation. New law say we have to pay \$1,000 for two-year lease and so much a ton, and after we open it up at end of two years somebody could bid a few cents more and take it away from us, and besides we have a man out of Bureau of Land Management over us, no soap.

This letter clearly illustrates how widespread this problem has become.

I also had occasion to get into the travertine situation in another instance and found that they had decided that travertine was not subject to location any more.

We have to straighten this situation out. Somehow, somebody seems to have gotten the idea that if anybody prospects and locates minerals on the public domain or ore or rock deposits, it is a steal from the Government. If this were true, I think you would agree with this statement: We would never had had any mining development in the West. Would we have?

Senator METCALF. No; I think that the greatest single factor in the development of the West was the mining law of 1872 when people were permitted to come out and locate upon the public domain, explore and try to develop the minerals. Montana and Colorado and Idaho—those great mines in the Cordilleras and mines in Butte—would never have been developed or discovered under the present philosophy of our Interior Department.

Senator ALLOTT. As a matter of fact, in Colorado it had other situations, because out of the early mining laws and the locations in Colorado came the water doctrine of prior appropriation—

Senator METCALF. The same is true in Montana.

Senator ALLOTT (continuing). Which is generally used in the Mountain States as the basis of water law, as distinguished from old riparian rights.

So I get a little concerned when some of our people who are unacquainted with the facts become obsessed with the idea that any location of mineral rights or anything of that sort is a robbing of the public. If the West is going to continue to develop, we are going to have to continue to be forward looking in our laws.

The same thing is true in Wyoming, Idaho, and Colorado. There are far, far more minerals underground that can be used for the development of this country than have ever been taken out so far.

Senator METCALF. Again I want to refer to the analogy made by Senator Cannon. We have the Coal Mine Safety Act that takes care of minerals that are not locatable, nonmetallic minerals and their leases, and then we had this Nonmetallic Mine Safety Act that takes care of all the others except coal and petroleum, and it would seem that we could carry that analogy right through into other mining, including sand and gravel, very unusual kinds of stone that are beautiful building stone and equal to anything we can import from Europe are called "common varieties."

In your State and in my State this is true. Also it is true in Idaho, California, and elsewhere in the West. And it is strange that we can say a mining inspector from the Federal Government or a mining inspector from the State will go out and inspect a copper mine and a quarry and a sand and gravel location, but I cannot locate on the sand and gravel and you cannot locate the travertine or gabbros, if rhyolite is in the same class and should be included.

Senator ALLOTT. It is not the same chemical classification.

Senator METCALF. The same classification as being a very unusual kind of stone.

Senator ALLOTT. Thank you. That is all I have, Mr. Chairman.

Senator GRUENING. We have a number of witnesses on this proposed legislation. After today's hearing is concluded, I am going to suggest

that you, as the sponsor of this bill, S. 3485, and Senator Cannon, as sponsor of S. 2281, get together and work out a happy wedding of the two. Then we will try to get an executive committee meeting before we go in recess because of the urgency of the subject matter of this bill.

We do not know how long the Congress will last, but if we could get action by reporting this bill to the full committee before the recess and proceed with favorable action by the committee after the recess, I think we would expedite what we all agree is an important piece of legislation.

If that is agreeable to the members of the subcommittee, we will try to do that.

Senator METCALF. Thank you, Mr. Chairman.

(The documents referred to follow:)

STATEMENT OF ROBERT E. MATSON, GEOLOGIST, MONTANA STATE PLANNING BOARD

The State Planning Board is the official economic development agency of the State of Montana. As such, the Board works toward the development and expansion of industry within the State including the mining industry. Montana has great metallic and non-metallic mineral wealth and the State is just now beginning to realize its potential in increasing the mining and processing of this wealth to the economic advantage of the State and the nation.

For the past three years I have been working with the Mining Association of Montana and several mining companies who have experienced difficulties due to the interpretation of "common varieties" under Public Law 167 (Section 3, 84th Congress, Chapter 375, First Session) by the Departments of Interior and Agriculture and their administrative decisions and policies concerning this law.

I believe that the Departments of Interior and Agriculture in their interpretation of "common varieties" under Public Law 167 have discouraged exploration and development of new non-metallic mineral deposits by requiring unrealistic lease arrangements and royalty payments. In addition, I believe that the decision of the Departments of Interior and Agriculture to classify any stone used for building purposes as "common variety" is completely arbitrary.

Claimants who have contested ruling that their claims were on "common variety" material have found themselves facing a situation requiring large expenditures of time and money at a time when both of these items were most crucial in starting and maintaining a new industry.

I have been involved in the preparation of S. 3485 and believe it is a good bill and that the definitions included therein will obviate further controversy between the Departments of Interior and Agriculture and the mining industry as to what constitutes "common varieties".

I believe that the only expedient way of correcting the problems which have arisen through the administration of Public Law 167 can only be solved by an amendment of Section 3 of Public Law 167. Therefore, I urge the Interior Subcommittee on Minerals, Materials, and Fuels to render a favorable decision regarding S. 3485 as introduced June 9, 1966.

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STATEMENT OF UUNO M. SAHINEN, ASSOCIATE DIRECTOR, MONTANA BUREAU OF MINES AND GEOLOGY

Senate Bill 3485 (89th Cong. 2d Sess.) is certainly a step in the right direction in the clarification of the meaning of "Common Varieties" as used in P.L. 167 (Act of July 23, 1955, Ch. 375, 69 Stat. 368). If passed, it will serve to relieve distressing bureaucratic interference with legitimate mining operations engaged in producing building stone and other varieties of commercial stone in Montana. I would have liked building stone defined as a locatable mineral commodity in this bill thus reiterating the validity of Title 30, sec. 161, U.S. Code which authorizes location of building stone "under the provisions of the law in relation to placer mineral claims." Building stone as here used refers to stone used in the construction of buildings occupied by man or used by him in

business, governmental or social activities, in contrast to stone used in massive construction such as bridges, dams, and highways. The term could be inserted on page 2, line 15, as follows: "(2) building stone, such as travertine, marble, limestone, granites, or gabbros, etc. etc."

Page 2, lines 8 and 9. "Use or usefulness for a common purpose or application shall not classify a material as a common variety;" may be misleading. I did not grasp the real significance of it at first. I would say, "Use or usefulness for a lower grade purpose or application . . . etc."

I am a little dubious of Item 3 beginning on line 21, page 2, pertaining to exclusion of concrete aggregate from common varieties. However, if the specifications mentioned are rigid enough, such exclusion might be justified.

It is my sincere hope that at least Items 1 and 2 are retained and passed by Congress.

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STATEMENT OF L. H. LARISON, PRESIDENT OF AMERICAN CHEMET CORP. OF HELENA, MONT.

My name is L. H. Larison. I am president of American Chemet Corporation and Montana Manufacturers Association.

American Chemet mines, processes and sells unusual stone, such as Arragonite type onyx, black and gold marble, red granite, green quartzite and black gabro.

The onyx, and black and gold marble are on public domain, and are sold in the form of terrazzo chips for polished floors and wall panels. The by products of the onyx are roof chips and calcium carbonate for feed, fertilizer and paint pigment.

The black and gold marble is made into terrazzo chips and can also be sold as polished wall panels. This product is similar to one that is imported from Italy.

The Black Gabro is located on public domain. It is mined and processed for use as exposed aggregate for buildings and is used in filtration beds in oil refineries. In this latter use it is superior to any other known mineral, and according to Uno M. Sahinen, Associate Director of the Montana Bureau of Mines and Geology, there is no other known deposit in the United States.

This testimony was recorded at a Senate Sub-Committee hearing in Butte, Montana, June 18, 1965.

On July 29, 1965, the Bureau of Land Management conducted a hearing, identified as contest #1764 Montana.

The decision rendered from this hearing was that the mining claim on black gabro was invalid.

I strongly urge approval of S-3485 as a means of clarifying the true meaning and intent of Public Law 167.

Under present circumstances, persons engaged in mining stones and minerals must continually face harassment from employees of the Department of Interior. These Interior Department employees also need a clarification and change in public law 167, so that they can fairly administer the law.

It is a definite hardship on the small mine operator and prospector to continually have his right to mining claims questioned and be ordered to hearings with expert witnesses at considerable expense.

The mining industry in Montana and many other Western States has depended a great deal on mining in the past. Mining activity in the past few years has declined. The present method of administering Public Law 167 is discouraging to the miner and detrimental to the mining industry.

It is my firm belief that passage of S-3485 will be helpful to the mining industry.

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Mining Association of Montana,  
Butte, Mont., June 24, 1966.

Senator ERNEST GRUENING,  
*Chairman, Subcommittee on Minerals, Materials, and Fuels, Senate Committee on Interior and Insular Affairs, Washington, D.C.*

DEAR SENATOR GRUENING: The Mining Association of Montana wishes to place itself on record as strongly supporting S. 3485, introduced by Senator Lee Metcalf and yourself as co-sponsor.

We believe it is apparent from the factual information received by your committee at the hearings held in June of 1965 in Butte, Montana and Wash-

ington D.C., along with statements later submitted, that a clarification of Section 3 of P.L. 167 is necessary because of the interpretations and the administration of the act.

We believe S. 3485 will carry out the intent of Congress to safeguard the interests and rights of bona fide mineral prospectors and mining operators.

Respectfully,

W. G. MALONEY, *Secretary-Manager.*

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NEVADA MINING ASSOCIATION, INC.,  
*Reno, Nev., June 23, 1966.*

HON. ERNEST GRUENING,  
*Chairman, Hard Minerals Subcommittee, Senate Interior and Insular Affairs Committee, Washington, D.C.*

DEAR SENATOR GRUENING: We have been notified that hearings are to be held June 28, 1966 on S. 3485, Amendment of the Common Varieties Act, copy of which has been supplied to this office.

Both large and small operators are severely hampered by inability to determine the validity of their claims without testing through expensive litigation. Production from claims not determined to be valid leaves the operator open to heavy liability.

Our analysis of S. 3485 leads us to believe this will go a long way toward protecting the rights and interests of bona fide mineral prospectors and mining operators and eliminating the uncertainties and vagueness of Administrative interpretation. We wish to go on record as strongly urging passage of S. 3485.

Respectfully yours,

PAUL GEMMILL.

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W. R. GRACE & Co.,  
ZONOLITE DIVISION,  
*Libby, Mont., June 23, 1966.*

Senator LEE METCALF,  
*Senate Office Building,  
Washington, D.C.*

DEAR SENATOR METCALF: The non-metallic industry has in many instances been presented with problems arising out of interpretation of the definition of "common varieties" as presented in section 3 of the Act of July 23, 1955 (ch. 375, 69 Stat. 368).

Passage of Bill S. 3485 would do much to clear up the ambiguity of this section. It is our feeling that this bill should be passed. It will be of benefit to the non-metallic industry and should clarify the position of those charged with administration of the original act.

It would be appreciated if you would present the viewpoint of this writer to the subcommittee on Interior Minerals, Materials and Fuels holding hearings on this bill.

Very truly yours,

E. D. LOVICK.

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DILLON, MONT., *June 23, 1966.*

Senator LEE METCALF,  
*U.S. Senate,  
Washington, D.C.*

DEAR SENATOR METCALF: I certainly appreciate your informative wire of June 22. Thank you.

This has to do with the Interior Minerals, Materials and Fuels Subcommittee hearings on the Common Varieties Bill, S. 3485 which will be chaired by the very able Senator from Alaska on June 28 in Washington:

Since it will be impossible to make an appearance personally, I would very much appreciate your including the following in the record if at all possible.

To those of us that have seen the controversy brought about by the broad definitions of "Common Varieties," this bill is the answer to our dreams. I most certainly endorse it in its present form.

Basically, what is sought and what you and Senator Gruening has worked so hard for is a better definition of "Common Varieties"—here we have it.

Definitely, I am not alone in saying that the efforts of you two men are greatly appreciated.

If I can be of further assistance please do not hesitate to call on me.

Very truly yours,

WILLIAM M. HAND.

HELENA, MONT., June 25, 1966.

Senator LEE METCALF,  
Senate Office Building,  
Washington, D.C.:

Thank you for telegram information of hearings on Senate bill 3485. Impossible for me to be present, but wish to place myself on record as supporting this bill.

NORMAN ROGERS.

HELENA, MONT., June 25, 1966.

Senator ERNEST GRUENING,  
Senate Office Building:

After reading draft of Senate bill 3485, I wish to place myself on record as supporting this bill.

NORMAN ROGERS.

Senator GRUENING. I have a statement from Senator Bible of Nevada, for inclusion in the record.

STATEMENT OF HON. ALAN BIBLE, A U.S. SENATOR FROM THE STATE OF NEVADA

Mr. Chairman, as a co-sponsor of S. 2281, I am pleased that your Subcommittee is holding hearings today on bills to amend the Common Varieties Act.

The interpretation of the Department of the Interior of the Common Varieties Act which does not distinguish between common and special varieties of building materials has caused frustration and hardship to many legitimate mining interests. It has been a troublesome problem in my State and in other areas and, in my opinion, needs correcting. It is for this reason that I am particularly pleased that the Senate Subcommittee on Minerals, Materials, and Fuels has called hearings today on bills which will offer clarification.

As a member of the Public Land Law Review Commission, I know this is one of the important areas in which further study will be given; nevertheless, it is a problem for the Congress and I am hopeful language can be developed by this Committee which will permit orderly development of legitimate materials, with proper safeguards, for those who are ready and willing to make investments.

It is true that some unscrupulous practices of the past, such as spurious mining claims, have caused unauthorized uses of public lands. I do not favor such uses and I am sure that none of the members of this Committee favors such practices. Irrespective, legitimate mining activities of sand and gravel and other common materials should not be sacrificed.

I am fully cognizant that some language in S. 2231 may be of concern to members of this Committee and to what we know as the "hardrock" miner. Nevertheless, some protection in my opinion must be given to legitimate operators and further clarification of materials and protection for the producer is vitally needed.

The bill offers a starting point and I trust this Committee will produce language from the several bills before you to alleviate some of the concern and confusion experienced by those who produce sand and gravel, building stone, and other special varieties.

Thank you.

Senator GRUENING. Our next witness is Mr. Thomas J. Cavanaugh, Acting Solicitor of the Department of Interior, accompanied by Ernest F. Hom and Frederick N. Ferguson.

We are happy to have you gentlemen. Will you please identify yourselves for the record.

**STATEMENT OF THOMAS J. CAVANAUGH, ACTING SOLICITOR, DEPARTMENT OF THE INTERIOR; ACCOMPANIED BY ERNEST F. HOM, ASSISTANT SOLICITOR FOR LAND APPEALS; AND DAVID B. FINNEGAN OF THE LEGISLATIVE COUNSEL'S OFFICE**

Mr. CAVANAUGH. Thank you, Mr. Chairman.

I am Thomas J. Cavanaugh, Acting Solicitor of the Department of Interior, and I am accompanied by Ernest F. Hom, Assistant Solicitor for Land Appeals of the Department of the Interior, and Mr. David B. Finnegan of the Legislative Counsel's Office of the Department.

If I may, Mr. Chairman, I do have a brief statement I would like to read.

Senator GRUENING. Please go ahead.

Mr. CAVANAUGH. The Department of the Interior is very pleased to have the opportunity to offer its comments to you on S. 2281, a bill to amend section 3 of the act of July 23, 1955 (69 Stat. 367, 368), and to authorize mining locations for certain mineral deposits, and S. 3485, a bill to amend section 3 of the act of July 23, 1955 (ch. 375, 69 Stat. 368). Both of these bills would amend section 3 of the act of July 23, 1955, which is usually called the "common varieties" provision. S. 2281 would also add a new section 3A to that 1955 statute.

Few enactments in recent years have presented such difficulties of interpretation as the "common varieties" provision. Section 3 of the 1955 act provides that no deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall be deemed a valuable mineral deposit within the meaning of the mining laws.

"Common varieties" are defined as excluding deposits which are valuable because of some properties giving the deposit a "distinct and special value." Ever since that statute became law on July 23, 1955, there has been great dispute as to just what is a distinct and special value, and the Department's decisions in that respect, though we believe them to be required by the law, have been widely criticized.

What properties may be recognized as giving a distinct and special value is a matter of dispute. Some have suggested that extrinsic qualities such as the geographic location of the deposit, accessibility to market, and means of transportation, should be recognized. Others have emphasized the intrinsic qualities of the deposit such as its physical properties or chemical composition should be recognized.

After 10 years' employment of this provision we are happy that your committee has before it two bills which would amend it.

Section 1(a) of S. 2281 would amend section 3 by changing the definition of "common varieties." In addition to excluding from that definition deposits having properties giving them distinct and special value and deposits of block pumice, S. 2281 would also exclude "limestone suitable for use in the production of cement, metallurgical or chemical grade limestone, and gypsum" and also "sand, gravel, and rock for use as aggregates in the manufacture of concrete or for other construction purposes."

The exclusion of sand, gravel, and rock usable for any construction purpose would come close to abrogating section 3 and returning to the conditions existing before 1955. This does not seem to us a feasible solution. The 1955 act was passed to correct serious misuse of the

public domain, and there is no justification for returning to conditions in existence before that statute.

Accordingly, it is our tentative recommendation, after careful consideration of this problem, that section 3 should be amended to provide that there will be no locations made in the future for any deposits of sand, stone, gravel, pumice (other than block pumice), pumicite, clay, cinders, or petrified wood. All distinctions between common and uncommon varieties of those mineral substances should be dropped. Whether a deposit is of a common variety of sand or of an uncommon variety of sand, it should not be deemed a valuable mineral deposit within the meaning of the mining laws.

This, in our opinion, is one solution which will give adequate protection to Federal interests in the public domain and which will be so clear and free of ambiguity that it can be fairly, easily, and understandably applied. Our report contains suggested language for this purpose.

I would like to emphasize that this recommendation is offered only as a tentative and possible solution, because S. 3485 offers a different solution which we have not yet had time to study and evaluate. This bill was only recently introduced. We shall give you our comments on that approach as soon as possible.

Senator GRUENING. How soon will that be?

Mr. CAVANAUGH. I think, Mr. Chairman, if we have to—I don't think the Legislative Counsel's Office has gotten any reports from any of the interested bureaus yet.

Dave, do you have any estimate of—

Mr. FINNEGAN. We would hope we could comment within the next few weeks, sir.

Senator GRUENING. We would like to have that report when Congress reconvenes.

Mr. FINNEGAN. We will do our best to comply.

Senator GRUENING. Thank you.

Mr. CAVANAUGH. As I have said, S. 2281 would not only amend section 3 of the act of July 23, 1955, but would also add to that statute a new section 3A. Perhaps it was intended that the new section 3A would have general application to all future mining locations and to mining locations in existence based on minerals described in section 3, but we interpret section 3A as intended to apply only to mining claims and minerals described in section 3 as amended by S. 2281.

If our proposed amendment of section 3 is adopted, there will, of course, be no future locations for any minerals described in that section and, therefore, section 3A's applicability would be limited to a few mining claims already in existence.

In our opinion, the scope of section 3A would be so limited that there would be little value in its enactment. We should, however, point out that we find the proposed provisions of section 3A very interesting and, although we are not prepared at this time to concur in their exact terms, we believe that they should be given serious consideration as a general amendment to the mining law of 1872.

However, I wish to emphasize that immediate amendment of the "common varieties" provision is so important that we would prefer to have any general amendment to the mining laws handled separately.

That concludes my statement, Mr. Chairman.

Senator GRUENING. In other words, you are in favor of this legislation in general, although you have some minor reservations as to language; is that correct?

Mr. CAVANAUGH. Well, we think there are perhaps several approaches to the problem, Mr. Chairman. We would prefer the approach suggested in our report to the committee and that is the one I have also suggested as a tentative solution, and that is the elimination of the distinction entirely.

S. 2281 offers a second approach. We do have objections to that, as I mentioned, primarily as to the provision on defining "common varieties." We feel that this is really too broad, that we would have difficulties, again, of interpretation, that really it is almost a return to a situation which prevailed prior to the enactment of this statute.

Another approach, of course, is the approach that we find in Senator Metcalf's bill, S. 3485. Our examination leads us to the conclusion that this has some promising features. We cannot report on it this morning simply because we have not had it long enough to properly evaluate it.

Of course, the last approach, and the one that I am sure that we are all in agreement on, that what we would not want, would be to return to the conditions before 1955.

I do not know whether that rather lengthy statement answers your question or not, Mr. Chairman.

Senator GRUENING. Senator Metcalf, do you have any comments?

Senator METCALF. I wish that we did have some recommendations on S. 3485, because as you point out, Mr. Cavanaugh, the approach is quite a bit different than S. 2281. Probably we should give careful thought to the enumeration of the varieties of stone that are listed, so that we can be sure that we have included all.

Senator Allott has mentioned rhyolite, which is not mentioned in subparagraph 2. It would seem to me that by pointing out that certain limestone, travertine, marble, and so forth, used for cement, as you have in your regulations at the present time, and also used for facing and beautification of buildings, should be taken out of the classification of "common varieties." This would take care of most of this problem.

At the same time I do not know about this subparagraph 3 which gives some discretion to determine what concrete aggregates and sand and gravel and pumice deposits and cinders shall be.

It would seem to me that approach would take care of the complaints that developed during the hearings that Senator Gruening has held and at the same time prevent us from going back to the situation that was in existence before 1955.

Mr. CAVANAUGH. Well, I might say, Senator, that my own reading of your bill leads me to the conclusion that it does have considerable merit along the lines you suggest.

Certainly, the Department has reported, I think, by letter, as well as the statements that were made at the last hearing that Senator Gruening had on this act, and we have indicated that we recognize the need for clarification of this.

We are certainly no more infallible than the next fellow. This is an act of Congress. I think that perhaps we do need guidelines from Congress, and that is what your bill is attempting to provide, assum-

ing that the committee or the Congress would not prefer the approach the Department has suggested. We are going to need guidelines and we have asked for them. We have suggested before that some approach along this line would be helpful. Certainly any time you make a vague classification more specific it is going to be helpful in its interpretation.

Senator GRUENING. Senator Jordan, do you have any questions or comments?

Senator JORDAN. No; I am wondering, Mr. Chairman, this bill was introduced on July 13 last year and it is now nearly a year old before we get a report. I have not had time to read this report that comes from the Department. It just arrived this morning. Why do we have to wait nearly a year to get a report on a bill?

Mr. CAVANAUGH. I am not sure in this specific instance, Senator Jordan, but I understand one thing was that we had reports in draft ready to submit when Senator Metcalf's bill was introduced. We held those up not realizing, of course, that there would be hearings.

There are a number of opinions on this subject in the Department. There are a lot of views. We would like to get as good and complete views as we can to the Congress by combining these reports. Would you speak to that, Dave?

Mr. FINNEGAN. Especially that is the case. We wanted to consider them both. As Mr. Cavanaugh mentioned, we had drafted the report on S. 2281, which we were proposing to send to the Budget Bureau, but then this bill was introduced and we did not expect hearings this quickly. We thought we ought to reconsider the original bill in connection with this later bill, so we could be more informative to the committee and unfortunately the time did not permit us to take care of both considerations.

Senator GRUENING. As you know, we face a time problem here. We would like very much to get all your reports in by the middle of July, because then we will have to have an executive to consider this in subcommittee and full committee, and we would like to get this bill acted upon in this session of Congress.

Mr. FINNEGAN. We will report on both bills later on, sir.

Senator GRUENING. Thank you.

Senator Allott?

Senator ALLOTT. Yes, I would like to comment on the time situation, Mr. Chairman.

I think we do need to straighten this matter out and in view of the situation in the House of Representatives and the time schedule of the Interior Committee there, which is quite absorbed and scheduled quite heavily pretty far in advance, I would even like to voice the thought, without having consulted the chairman of the committee in the House, that we may not be able to get this matter considered in the House of Representatives this year.

I would urge that we move along, but I would not want to move along so fast that we do not give this the utmost consideration and try to come out with a workable classification.

Have you ever thought about rhyolite?

Mr. CAVANAUGH. No, Senator; I have not. I do not know what it is. As a matter of fact, I suspect from hearing you read that letter, that the real question there is—

Senator ALLOTT. No, this letter was with respect to travertine.

Mr. CAVANAUGH. I see, I am sorry. I thought perhaps the question was whether it was leasable under the Mineral Leasing Act or not, rather than a question of—

Senator ALLOTT. In this particular letter they have told him that it is leasable but it is not subject to location.

Mr. CAVANAUGH. Well, this is a question, of course, which—

Senator ALLOTT. And as he points out, here is a fellow who is a workingman. He and his brother work together. They spent years developing a travertine deposit and then at the end of 2 years of commercial operation it is up for grabs to anybody who wants to take it over, who bids a few cents more. It does not provide for much protection for development.

Mr. CAVANAUGH. Well, I will not argue with that statement, Senator.

I am not sure of the regulation under the Materials Act. I would have to look at that, Senator. I will not argue with the statement that 2 years is a short time. However, I am not familiar with the particular case.

Senator ALLOTT. I would like to read a portion of a letter from Mr. Lowell M. Puckett, State director of the Bureau of Land Management, in Colorado.

Senator GRUENING. Formerly stationed in Alaska.

Senator ALLOTT. Yes, a very fine man, and this is not critical of him in any way. He does a very able and effective job in Colorado.

Reading from paragraph 2 of the letter which he wrote to the gentleman from whose letter I quoted, he says this:

It is our opinion, however, based on the provisions of Public Law 167 of July 23, 1955, and legal decisions made by the Secretary of the Interior and the courts pursuant to that Act, that marble suitable for building purposes is a common variety, regardless of its color, cleavability, price, demand, or quality. Section 1 of Public Law 167 provides: "Such materials (i.e. common varieties) may be disposed of only in accordance with the provisions of this Act and upon payment of adequate compensation therefore, to be determined by the Secretary." Thus, we conclude that we are authorized by law to dispose of this marble only under provisions of the Materials Sales Act of July 31, 1947, as amended.

Now, he points out in his previous letter that some of the marble from this particular group is in the Pentagon and that it has been used in many public buildings. I do not see how a marble or travertine as valuable as this could be thrown in the same category with sand and gravel. And yet this is the opinion that the Interior Department has made under the 1955 law.

Mr. CAVANAUGH. I really cannot comment on the case, Senator, because I am not familiar with all the facts. I do not know of any decisions of the Department which have held marble, as such, to be a common variety.

Senator ALLOTT. Well, I am sure that Mr. Puckett did not write this letter just on his own.

Mr. CAVANAUGH. No, sir; I am sure that he did not either. But I think that this is his interpretation, perhaps, of the few decisions that we have had at the administrative level on this and, of course, any such decision is subject to appeal to the Secretary. I have no knowledge of whether or not an appeal was taken, so it is very difficult for me to comment on it.

We have had really very few cases determined at the administrative level on this subject. They have been determined on an ad hoc basis and I could not venture a guess as to what might happen were this case appealed to the Secretary.

Senator METCALF. Would the Senator from Colorado yield a moment?

Senator ALLOTT. Yes.

Senator METCALF. You have decided, however, that travertine is a common variety. It is a beautiful stone equal to imported travertine and fully equal in its decorative qualities to marble.

Mr. CAVANAUGH. Senator, I do not know the exact status of that matter, but I do not think it is quite correct to say we have decided. A contest proceedings, as I understand it, has been brought alleging that travertine is a common variety. I do not even know whether that contest proceeding has been heard, Senator, and, of course, the decision of the examiner is appealable in turn to the Director and to the Secretary, so the fact that—well, I do not think I should lecture a former member of the supreme court of my State on that.

These are allegations, Senator.

Senator METCALF. I know at some level it has been decided that it is a common variety and I do not know whether the Secretary has made a decision or not.

Mr. CAVANAUGH. I am not even sure it has been through the hearing examiner stage.

Senator ALLOTT. Is it not true that marble and travertine are the same chemical composition?

Mr. CAVANAUGH. I do not have any knowledge of that, Senator.

Senator ALLOTT. If my memory is correct, are they both calcium carbonate?

Mr. CAVANAUGH. I would assume that they are. I hate to make a positive statement.

Senator ALLOTT. I know both of them are subject to attack by common acid and so you have a common thing there.

Mr. Chairman, in order that the Department may reply intelligently, I would like to ask the consent to insert both the letter from Mr. Puckett in Denver and also the letter from Mr. Cowan, because the two of them together pose a practical problem which this committee is trying to solve here.

Senator GRUENING. They will be included at this point.

(The letters referred to follow:)

COWAN BROS.,

Canon City, Colo., January 3, 1965.

Senator GORDON ALLOTT,  
Washington, D.C.

DEAR SIR: See by the papers that you are one of the men appointed to serve on Public Land Commission.

Now, Mr. Allott, we have been quarrying Marble or Travertine for forty years or more northwest of Canon City, Colorado. Our operation is small always has been, most hired men at one time was three. We two brothers worked in quarries. We sure had a hard time for a good many years, but we stayed with it. We have quarried a good lot of marble or Travertine that has went into government Buildings.

Carthage Marble Corporation of Carthage, Missouri, has our Marble contract, they have our production.

Now we were anticipating of opening a new quarry in Garden Park District on Rocky Ridge, it is on open land so we went to take it up as used to do found

out the new land law has changed it so we cannot operate Marble quarry under new regulations.

It takes at least five years for a small operation like ours to get into operation. New law say we have to pay \$1000.00 for 2 years lease and so much a ton, and after we open it up at end of two years somebody could bid a few cents more and take it away from us, and besides we have a man out of Bureau of Land Management over us, no soap.

If we haven't learned in forty years we should quit.

Now in passing will say some of our Marble is in Pentagon Building and eight columns of Royal Breche Marble from one of our quarries, they say they are beautiful they are on new work on Capitol building, in Washington D.C. work on those columns was done by the Carthage Marble Corporation, Carthage Missouri, they turned and polished them then delivered them.

Now we think the new land law is not right. It does not make it plain. Marble as a rule is not considered as a common material, when some of it is like the best foreign Marbles.

We have never sold any stock or borrowed any money or run any bills since we started quarrying forty years ago.

You now have a history of our operations since we started.

We quarry Colorosa, Colorcreme, and Mahogany and also Royal Breche Marble and Travertine.

Truly Yours

COWAN BROS.  
By JOSEPH E. COWAN.

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DEPARTMENT OF THE INTERIOR,  
BUREAU OF LAND MANAGEMENT,  
Denver, Colo., December 17, 1964.

MEMORANDUM

To: District Manager, Canon City.

From: State Director, Colorado.

Subject: Cowan Bros., inquiry regarding possible marble material sale.

We are attaching a copy of a letter to the Cowan Brothers resulting from a field inspection on December 1, 1964. This is a report of Meschter's examination. The facts appear to be as follows:

The Cowan Brothers have found a deposit of marble and have opened a small prospect quarry a few hundreds of feet west of the quarter corner between Sections 27 and 28, T. 16 S., R. 70 W., 6th P.M., Fremont County, Colorado. (See attached map.) Status shows that the prospect is on vacant public land. Status also shows that the SE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 21, the SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 22, the NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 27, and the NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 28 is in Stock Raising Homestead subject to the reservations of the Act of 1916. The SW $\frac{1}{4}$ NW $\frac{1}{4}$  and the NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 27 is in Homestead patented without reservation. The Cowans represented that they have purchased the mineral rights to 100 acres including the E $\frac{1}{2}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 28, the S $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 22, and the NW $\frac{1}{4}$ NW $\frac{1}{4}$  and the N $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 27. This reported purchase appears to be inconsistent with the status of the Stock Raising Homestead except as to the N $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 27.

The land around the prospect quarry is sloping mountainous terrain at an average elevation of about 6,850 feet. The surface slopes about 15 degrees to the east toward Fourmile Creek. The topography along Fourmile Creek and along Red Canyon less than one-quarter mile to the north is rough with steep slopes and precipitous cliffs. The rocks are well exposed in cliffs along Red Canyon in the NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 28 (Photograph No. 1).

The soil is rocky and thin supporting sparse grass and "breaks" of principally juniper. (Photograph No. 3.) The land has only normal or less than normal value for stockraising purposes. Some chaining has been done in the vicinity for range improvement.

Improvements on the land include the prospect quarry which is about 20 feet long, 10 feet wide, and 4 feet deep at the face (Photograph No. 2). It is a shelf quarry driven into the slope of the mountain along the north side of a small gully. It is about 100 yards east of a private dirt road and is fairly well concealed by trees. Excellent access is offered by the dirt road which leads from a county road along Fourmile Creek westerly into upper Red Canyon.

The site is reached from Canon City by going north from 15th and Main Streets in Canon City 14.6 miles along the county road, following signs to Red Canyon, to the junction with the private road, and thence through a gate approximately 1.2 miles to a point on the upper east slope of Rocky Ridge just west of the prospect quarry.

Geologic sources indicate that the marble probably is in the Fremont dolomite formation of upper Ordovician age. The rock outcrop is in a larger mass of undivided Cambrian and Ordovician rocks of perhaps 6 square miles area. These rocks are chiefly dolomitic marbles in the Manitou and Fremont formations, and sandstones and quartzites in the Sawatch and Harding formations. The mass is bounded on the west and north by Precambrian granites. The boundary on the east and south is a fault dropping upper Paleozoic and Mesozoic rocks down into juxtaposition with the older formations.

The rocks exposed at the prospect quarry in which the Cowans are interested is dolomite which has been moderately metamorphosed to a finely crystalline marble with alteration of the shaly constituents to limonite and possibly some hematite. The rock is dense and competent—desirable physical properties for marble of building stone classification. The color is basically tan or buff, mottled with dull light brownish red. Indistinct yellow streaks are found in the tan areas. Irregular bedding planes at 6 to 8-inch intervals are thoroughly healed and do not form planes of noticeable weakness. Rather, these healed bedding planes add to the attractiveness of the polished rock.

The marble bed as it is exposed in the prospect quarry strikes from N 62–84° E and dips about 11° to the southeast down the slope of the mountain. Since the slope of the mountain locally is somewhat greater than the dip of bed, the residual part of the bed under the surface is uphill at shallow depths and presumably will again outcrop at the top of the hill. As exposed, the bed in which the Cowans are interested is about 40 inches thick with a strong parting on the lower edge. It could not be determined with certainty whether the next bed below is a similar or different marble, although chips in the floor of the quarry indicate a similar marble below. The rock above this bed is a salmon pink marble. Although it is lithologically distinct in character, it may also be of commercial interest.

The Cowans estimate the value of this marble at about \$5.00 per cubic foot of useable marble in blocks exceeding 7'7" in length. This price is either at the quarry or on cars at Canon City, depending upon market demand and competition. Smaller blocks are worth less down to about \$2.50 per cubic foot for blocks at least 4 feet long. Marble runs about 12 cubic feet to the ton, but in commerce a smaller figure is used to express the useable cubic per ton in order to allow for waste. Thus, it is considered that the ratio of useable marble is 8 or 9 cubic feet per ton.

The fundamental problem at present is whether there is a sufficient quantity of the subject type of marble of uniform grade to justify development of a market. The depths to the subject marble bed are slight and probably will not exceed 25 or 30 feet for the foreseeable future. Thus, the indicated method of exploration is simply to open up the bed and quarry out sufficient stone to prove the extent and quality of the bed. A serious problem for any operator is gaining sufficient time to do this exploration and develop a market without danger of losing the right to exploit the deposit if the results of exploration and market development are favorable. In this case, exploration should not take more than a few months at the most if pursued with vigor. We, of course, cannot give an opinion of the time required for market development.

As our letter to the Cowans indicates there is no question in our mind that this marble is "common variety" by legal definition and that it can be disposed of only under the Material Sales Act of 1947. We think the Cowans should be encouraged to purchase the marble under a Material Sale contract. We have, accordingly, suggested a course of action for them which we think will be best for them and still be within the requirements of law.

We think that the minimum area they would require under a sales contract would be 40 acres. This would include a 20-acre tract extending north and west from the present prospect quarry which would include the bulk of the deposit, and 20 acres to the south for access, dump room, and such shops and storage space as may be required. This area is described as the N $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$  and the S $\frac{1}{2}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 28. The north tract might reasonably be extended to include the whole of the SE $\frac{1}{4}$ NE $\frac{1}{4}$  for a total of 60 acres, if an applicant insisted on this.

The present market survey appraisal for this type of material is \$0.50 per ton in sales less than \$100. We do not think at present that a special appraisal would change this sufficiently so as to justify reappraisal for a sale in the \$100 to \$1,000 range.

So far as is consistent with your range management projects, we would recommend the following in the event that the Cowans elect to make a sales application:

1. that a sale for this material include at least the 40 acres described above;
2. that a sale in the \$100 to \$1,000 range be made at \$0.50 per ton with the understanding the Bureau of Land Management may reappraise the material in the event of future or larger sales;
3. that the term of the sale be for as long a time up to the two year maximum for sales in the \$100 to \$1,000 range as the applicant may desire.

We recommend that you encourage material sales to the extent that you can as a preventative against mineral trespass for "common varieties." We think that this procedure will prove more effective in the long run in achieving proper disposal of mineral materials than adverse proceedings against mining claims.

LOWEL M. PUCKETT.

DEPARTMENT OF THE INTERIOR,  
BUREAU OF LAND MANAGEMENT,  
Denver, Colo., December 17, 1964.

Mr. DAVID COWAN,  
Care of Cowan Bros.,  
Canon City, Colo.

DEAR MR. COWAN: Thank you for your time and effort in showing your marble prospect to Dan Meschter of this office last week. We are interested in having such deposits developed. We agree that the polished specimen you left with us is unusually attractive. We see no reason why it should not be suitable for interior facings if a market for it can be developed.

It is our opinion, however, based on the provisions of Public Law 167 of July 23, 1955 and legal decisions made by the Secretary of the Interior and the courts pursuant to that Act, that marble suitable for building purposes is a common variety, regardless of its color, cleavability, price, demand, or quality. Section 1 of Public Law 167 provides: "Such materials (i.e. common varieties) may be disposed of only in accordance with the provisions of this Act and upon payment of adequate compensation therefor, to be determined by the Secretary." Thus, we conclude that we are authorized by law to dispose of this marble only under provisions of the Materials Sales Act of July 31, 1947 as amended.

We believe you already have copies of Circulars No. 2147 and 2149. Circular No. 2147 sets forth the regulations for the sale of mineral materials. Circular No. 2149 sets forth the regulations under the general mining laws. Provisions dealing with common variety minerals start on page 25. We are enclosing for your information a copy of Form 4-1551 which is used for sales contracts of more than \$100 and less than \$2,000.

Sales of less than \$100 are made by permit for a maximum of 90 days. These do not require competitive bidding or advertising. Sales of less than \$1,000 are also non-competitive provided that there is no apparent competitive interest in purchase of the material. These sales are made by contract on Form 4-1551 for a maximum of two years, and additional sales of the same material may be made to the same party provided that the total of non-competitive sales does not exceed \$1,000 in any year.

Sales of more than \$1,000 are competitive. They must be advertised and competitive bids solicited from interested parties. The regulations provide no maximum term for such sales. The conditions of each sale are determined on its own merits.

Sales of less than \$100 are made on the basis of a market survey appraisal. The current Bureau of Land Management market survey appraisal of marble suitable for use in buildings is \$0.50 per ton. This figure is based upon royalties actually being paid in the market. Sales of more than \$100 may justify an independent appraisal.

Material sales are administered by the District Manager. The District Manager in Canon City is Rowland G. Thompson who may be contacted at the district office at 1005 Main Street. He will be able to give you any further information you may desire concerning material sales.

We understand that your present problem is two-fold. One problem is the determination of whether there is a sufficient quantity of a uniform grade marble of this type present in your prospect to justify market development. The other problem is obtaining sufficient time to develop a market with the assurance that the marble will be available to you at that time.

The only feasible solution to your problem we can find under law is the following suggested procedure: First, we suggest you might consider a small purchase of from \$100 to \$1000 for a maximum of two years. This would permit you to quarry out and remove from 200 to 2000 tons of stone at the present appraised price which should be sufficient to prove the quantity and quality of marble present. It would protect you from adverse entry during the term of the contract and give you up to two years for market development. You could then make application for a larger sale for a longer term. The risks are that under the smaller sale you would become owner of stone for which you may not have a market, and in the event of a larger competitive sale, you might possibly be outbid in a future sale. The value of contracts is payable in full whether or not the material is actually removed from the land.

We appreciate your interest in developing this mineral resource and wish to cooperate with you to the fullest to see that it is properly developed and exploited. We would welcome a materials sales application from you and will do everything we can to make such a contract as agreeable to you as possible.

Sincerely yours,

LOWELL M. PUCKETT, *State Director.*

Senator ALLOTT. Let me ask you also, sir, to try in your report to investigate the aspect of rhyolite and report on your decision whether or not it should be included as a common variety or excluded.

Mr. CAVANAUGH. We will certainly attempt to, Senator. I might say, of course, that if this is in the process of adjudication we may not be able to, but we will certainly be glad to look into this.

Senator ALLOTT. As far as I know, it is not a specific question, but I have seen various types of rhyolite of various colors—pale tan, pink, gray—and it is a building stone. There is no question about this, but it is not truly a common one and I would like to have you comment on this material, either in a separate letter or in your opinion, if you would.

I say it is not a personal question with me and, of course, I assume it is taken for granted that no one here has any monetary or pecuniary or financial interest in any of these materials, either directly or indirectly, and I do not.

Mr. CAVANAUGH. I am sure of it.

Senator GRUENING. Senator Fannin?

Senator FANNIN. Yes, Mr. Chairman.

Mr. Cavanaugh, as I understand it, these bills or a bill to come out of the two of them, would provide for more types of mineral deposits that would be under the prospecting area; is that right?

Mr. CAVANAUGH. I do not know whether there would be actually more types, Senator, but we would have probably a better definition to work from to determine which types actually are.

Senator FANNIN. In other words, you need a clarification?

Mr. CAVANAUGH. This is what we need, Senator. We need a clarification. Obviously, from the difficulties that we and the public have had, the act, at least in our minds, does not give us satisfactory guidelines. This is what we are asking and believe is necessary.

Senator FANNIN. I understand we will have some industry witnesses and I imagine their testimony would be of value to you Mr. Cavanaugh, in making your recommendations to the committee. I would hope that you would take those items into consideration when you do make your recommendations.

Mr. CAVANAUGH. Yes. I think it will be helpful, Senator. I have found, and I think a number of the rest of us did, that the hearings Senator Gruening's committee had in Butte last summer at which industry witnesses appeared to be very helpful in this area.

Senator GRUENING. I would like to suggest that those two letters that Senator Allott introduced be responded to in the report that you make, so that you can address yourselves specifically to the point that Mr. Puckett and Mr. Cowan made.

Senator MOSS, do you have any remarks?

Senator MOSS. No, Mr. Chairman.

Senator METCALF. Could I make a statement?

Senator GRUENING. Go ahead.

Senator METCALF. Right here in Washington I am informed that the Supreme Court Building and the Library of Congress are faced with Montana travertine, which certainly indicates that it is of some special value.

Senator ALLOTT. Would the Senator yield there? I would also like to say that the interior of the State Capitol in Colorado is faced with marble from Colorado quarries, too, which is one of the most beautiful interiors I have ever seen in this country, so we have a real problem here and I hope we can work it out.

I thank the Senator for yielding.

Senator METCALF. I was referring to the case you are familiar with, the testimony of Jack Ahern, manager of the Montana Travertine Quarries, when we had the hearing in Butte. He said there was a ruling that this was a common variety of mineral. That ruling, as you indicated, may have been at some administrative level.

Mr. CAVANAUGH. I think this is right, Senator. Of course, somebody has to make the decision should this be contested, and I think perhaps that was the reference.

Senator METCALF. Anyway, thank you very much.

Senator GRUENING. Thank you very much, Mr. Cavanaugh. It might be useful if you stayed here and heard the rest of this testimony.

Arthur W. Greeley, Associate Chief of the Forest Service, Department of Agriculture. Mr. Greeley, we are happy to have you here this morning.

Mr. GREELEY. I have with me Mr. Reynolds Florance, who is Director of our Division of Legislative Liaison and Reporting.

**STATEMENT OF ARTHUR W. GREELEY, ASSOCIATE CHIEF, FOREST SERVICE, DEPARTMENT OF AGRICULTURE; ACCOMPANIED BY REYNOLDS G. FLORANCE, DIRECTOR, DIVISION OF LEGISLATIVE REPORTING AND LIAISON**

Mr. GREELEY. Mr. Chairman and members of the committee, I am Arthur W. Greeley, Associate Chief of the Forest Service. I appreciate this opportunity to be here this morning to make a statement on S. 2281 and S. 3485.

Mr. Chairman, I have to start with an explanation. The Department of Agriculture report is still being processed in the Department. The statement that I am about to make was prepared in anticipation that our report would be here by this time. I am informed that it will be here today. In view of the fact that the report is not here before

you, I am also instructed to tell you the position of the Budget Bureau with reference to the Department of Agriculture report.

This is a reasonably complex matter. The Budget Bureau people have advised us that time considerations have not made it possible for a determination yet to be made by the Budget Bureau as to the relationship of the Department of Agriculture report to the program of the President.

Now, sir, may I proceed?

Senator GRUENING. Please proceed, yes.

Mr. GREELEY. The Department of Agriculture recommends that these bills not be enacted in their present form.

S. 2281 and S. 3485 would amend section 3 of the act of July 23, 1955. This act is commonly known as the Multiple-Use Mining Act. In part it defined the rights which locators and the United States now have on mining claims located after July 23, 1955—the effective date of the act.

It also provided that “common varieties” of sand, stone, gravel, and certain other minerals are no longer deemed valuable minerals for purposes of locations under the mining laws. Under the act, common varieties are disposed of by lease or permit arrangements.

The Multiple-Use Mining Act has produced many beneficial results and, in general, we have looked upon it as extremely good legislation. We recognize that the problems in following and administering it have arisen, mainly in connection with the provisions on common varieties.

We believe the congressional committees, the executive departments, and the private industry representatives that considered and supported the Multiple-Use Mining Act felt that the common-variety provisions could be applied with little difficulty. Experience has been otherwise.

S. 2281 and S. 3485 would approach the “common varieties” problem by redefining and attempting to clarify the term through statutory amendment. S. 3485 would spell out new guidelines of classification. Both bills would specifically exclude from the common-variety category certain substances which have been found difficult to classify under the present statutory definition.

S. 2281 and S. 3485 might narrow some of the areas of uncertainty in dealing with common varieties. But their approach would not permanently solve the basic problem—that a “common variety” will always be difficult, if not impossible, to define exactly. The expanded definitions which the bills would establish still necessarily fail to eliminate shady areas for both operators and resource agencies which are prevalent under the present law.

There will be mineral substances which will fall on the borderline of any category rigidly defined by statute. Claimants under the mining laws would still have to risk contests when they mine such substances. Administrative decisions interpreting and further defining the statutory definition would still be necessary, and would still result in a degree of uncertainty.

S. 2281 and S. 3485 would also have the effect of narrowing the scope of the “common variety” category. The bills would thereby increase the number and types of relatively low value materials which would be locatable under the mining laws. Many of these materials, such as sand and gravel and stone for aggregate, are found in widespread areas and we feel should be treated as common varieties.

We feel that such a narrowing of the "common variety" category would be a step backward from the gains realized through enactment of the Multiple-Use Mining Act. One of the principal purposes of the act was to protect and insure multiple use of both the surface and subsurface resources on Federal lands. The removal of common varieties of sand, gravel, stone, rock, and other materials from location under the mining laws was considered essential to minimize conflicts between mining and the use of valuable surface resources.

The act recognized that many common varieties, such as sand and gravel for aggregate, have a marketable value. It provided for realization of the value through a sales or permit procedure. In this way, the disposing agency is able to protect the values of the surface resources which would be affected.

One of the principal areas of difficulty was revealed at the recent hearings held by this subcommittee on the interpretation and administration of the Multiple-Use Mining Act. This involves the uncertain application of the statutory term "common varieties" to mining claims on areas containing substances which are primarily valuable for use as building material. Such claims are often made in good faith with the belief that the substances involved are not common varieties and are, therefore, locatable under the mining laws. The locators undertake mining operations in reliance on this belief.

Problems arise when the claims are contested as being for common varieties, and therefore invalid under the mining laws. The locator is faced with costly and lengthy contest proceedings. He is uncertain as to where he stands in any operation of the claim while the proceeding is pending. Then, if his claim is determined to be invalid, he may be required to pay for all the material removed and for the cost of surface restoration.

Our people have discussed this matter with many locators. We feel that many of them would be willing to apply for and obtain a lease for the removal of the material if satisfactory procedures could be set up for the issuance of such leases. In most cases the locator has, through his own efforts, discovered the deposit. But under the present law, if he undertakes to apply for a lease to remove the material, he can, with few exceptions, obtain such a lease only through the competitive bidding process. He has no advantage because of the work he did in making the discovery and developing a market for the material.

Experience to date has shown that most of the contested claims for building materials have been determined to be invalid. Our experience also has been that there is a long lag before a final determination is made. These uncertainties could be removed and locators could be assured of leasing the deposits they have discovered through provisions which would: (1) remove from location under the mining laws all forms of sand, stone, rock, gravel, cinders, pumice, materials that have their primary value through use for building materials, and certain other nonmetallic materials the primary use value of which does not depend on its chemical properties but on the use to which it is put; (2) abolish the distinction between common and uncommon varieties of these materials; and (3) provide for their disposal through a leasing arrangement.

Provision could be made for prospecting permits, and the prospector could have a priority for issuance of a lease upon making a discovery.

Leases could be issued for a sufficiently long period to allow recovery of initial costs and could provide for noncompetitive renewals and expansions. Fees under leases would be for the value in place of the substance removed.

Provision could be made for issuing leases to those persons who on the date of enactment had made good faith locations. Or if such persons choose not to apply for a lease, they could rely upon their confidence in the validity of their location under the present provisions of the mining laws.

We realize that questions of this kind fall within the scope of the Public Land Law Review Commission studies. However, provisions along these lines could give needed assurance to operators, eliminate unnecessary frictions and burdens to operators and Government people, and enable the Government to give proper management to surface resources.

Subsection 1(b) of S. 2281 contains a group of provisions which would require recordation of certain mining claims.

The Secretary of the Interior, in June 1965, forwarded to Congress a proposed bill to provide for the recordation of mining claims. That proposal was introduced as S. 2248, and is in many respects similar to the recordation provisions of S. 2281.

We join with the Secretary of the Interior in this proposal and recommend that S. 2248 be considered by your committee in lieu of the recordation provisions of S. 2281.

The remaining provisions of subsection 1(b) of S. 2281 would effect major substantive changes in the procedures and administration of location and patent of mining claims. The question, therefore, arises whether these major changes should be enacted before completion of the study by the Public Land Law Review Commission.

Senator GRUENING. Well, that would postpone action for some indefinite period, would it not? The Commission is supposed to report by 1967?

Mr. GREELEY. All we are doing is raising the question whether these are major and rather significant proposals, Senator Gruening.

Senator GRUENING. You say the Department of Agriculture recommends that these bills not be enacted in their present form. Would you give us something more specific? As was brought up earlier in this hearing, we are faced with a time problem here and with all these various delays we are in danger of not being able to get effective action on this legislation, which we think is pretty important. The miners out there have been waiting anxiously for some action and we can very well sympathize with their feeling.

When do you think the report will be available?

Mr. GREELEY. I have a note the reports are on their way here now.

Senator GRUENING. In transit?

Mr. GREELEY. Yes, sir.

Senator GRUENING. We might in that case hear some of the industry witnesses and wait with bated breath for the appearance of these reports.

Mr. GREELEY. I don't think there is any bated breath involved, Senator Gruening. The testimony that I have just given is paraphrasing of the substance of the reports and this is also very similar in nature to the letter which we sent to you in March. What we are talking

about and what we are proposing here is a different approach than the approach involved in bills under consideration here. That is all.

The proposal in these two measures would get at the question of definition of common varieties by a statutory definition. We are saying that even with more complete statutory definition, there would still be interpretations that would be necessary. There would be gray areas out on the edge of the statutory definitions and it seems to us that it is a better approach, both from the standpoint of definiteness and from the standpoint of the flexibility to use the leasing approach rather than definition through an amendment of the statute as to what constitutes common varieties.

That is just a summary of the Department of Agriculture approach here, Senator.

Senator GRUENING. I think, speaking for myself, I would prefer to wait until we have seen the report, but maybe some of the other members of the committee would like to comment.

Senator Metcalf?

Senator METCALF. I find this is a very inconsistent statement. You say that you should await the Public Land Law Review Commission report for some of these decisions and yet you come in with a startling change in our whole concept of locatable property. You want to make it all leasehold.

It would seem to me that consistently carrying out your statement to its ultimate conclusion, you would eliminate the 1872 law and say that every mining claim had to be leased. Would you go that far?

Mr. GREELEY. No, sir; that is not what we have said here, Senator.

Senator METCALF. You say if you could do this—I wonder how many “could’s” you use there. You “could” do this, “could” do this, “could” do this, and if you did that you would have a completely different approach.

It would seem to me that the simple way to accomplish our purpose would be to tell you what Congress meant when it passed the common varieties law. As one Member of the Congress who participated in passing that law and enthusiastically supported it, I had no idea that the Bureau of Land Management and the Forest Service would give arbitrary and unfair interpretation to what we said about common varieties. It seems to me the simple thing for us to do is to say to the Forest Service, and the Bureau of Land Management, when we refer to common varieties we mean this and this and this, and we want you to carry out the purposes of the law.

Is that not a simple approach?

Mr. GREELEY. It is a very direct approach.

Senator METCALF. Is that not the approach that would be the easiest and the quickest to achieve what the legislative intent was?

Mr. GREELEY. Well, Senator, our concern has been that, particularly with reference to sand, stone, and gravel, which are very frequent occurrences—

Senator METCALF. All right, what about travertine?

Mr. GREELEY. Yes, I will agree with you on travertine.

Senator METCALF. All right. Then you would agree that part 2 of the bill that Senator Gruening and I introduced should be enacted? That is—

travertine, marble, limestones, granites, or gabbros, suitable for use with or without shaping or sizing in the commercial construction of exposed portions

of buildings, or suitable for high polishing, or accurate shaping for monuments, building plate or surface plate purposes, or so-called block pumice, which occurs in nature in pieces having one dimension of two inches or more \* \* \*

should be taken out of the common varieties?

Mr. GREELEY. I speak as a layman. I cannot speak from knowledge of all the substances that are listed in that section of the bill.

Senator METCALF. Those are all, as I understand it. We tried to enumerate all of them. Maybe we left something out.

Mr. GREELEY. Taking travertine as an example—

Senator METCALF. Yes; well, should travertine be leasable?

Mr. GREELEY. Well, is that objectionable?

Senator METCALF. Yes; I think it should be locatable. And I think that that is what we conceived in the Mining Act of 1872.

Mr. GREELEY. I can see that for building materials similar to travertine and that type of material which is suitable for use in interior finish, takes a high polish, has an attractive coloring and figure, and so on. It seems to me, speaking personally here, now, that that is not a common variety of anything. And I can see the Land Management problems that are involved there with quarrying this sort of building material being handled without great difficulty under a mining location arrangement. I have to acknowledge that I do not know enough about other substances here in this section, Senator Metcalf, to make a comment about them.

Senator METCALF. You want all this material leased and not located under the mining law?

Mr. GREELEY. That is my report. That is correct, sir.

Senator GRUENING. Senator Moss.

Senator MOSS. I think I have no questions at this point.

Senator GRUENING. Senator Jordan?

Senator JORDAN. I have no questions. I think he has made his position abundantly clear, that he wants no location of any of these varieties whatsoever.

Senator GRUENING. Senator Allott?

Senator ALLOTT. Mr. Greeley, did you hear my comments a while ago with respect to the Cowan letters that I submitted for the record?

Mr. GREELEY. I could not hear all of them.

Senator ALLOTT. Off the record.

(Discussion off the record.)

Senator ALLOTT. In the Cowan case which I have here Mr. Cowan—whom I do not know personally, but is obviously a man who has been engaged in this business of quarrying for some 40 years, he and his brother—points out after the decision by the Bureau of Land Management that it would take at least—and I read from his letter:

It takes at least five years for a small operation like ours to get into operation. New law says we have to pay \$1,000 for a two-year lease and so much a ton, and after we open it up at the end of two years somebody could bid a few cents more and take it away from us, and beside we have a man out of Bureau of Land Management over us, no soap.

That is what he says in his letter. In other words, here you have what you admit, from your viewpoint of marble and travertine, should not come within the common-varieties classification. We have a decision here where these people have to lease, not locate, and can you imagine that we are going to get much development if a man has to spend 5 years—even conceding this is a small operation—developing

a piece of land on a lease basis, only to be deprived of it after the development work is done? After 2 years of operation he could be deprived of it by somebody on a competitive lease for a few cents more.

Now, you have a very, very simple economic problem here: What do you do with things like this?

Mr. GREELEY. The answer I would prefer to see is an arrangement by which the man who does the development has an opportunity to be able to get a lease without having to go for a competitive bid.

We agree, Senator, that that is a statement that describes a phase of the problem, the thing that is being administered now as the state of the law.

Senator ALLOTT. Well, the decision of the Bureau of Land Management says that it can be disposed of. They say, and I quote from a memorandum to the State director in Colorado, on page 3:

As our letter to the Cowan's indicates, there is no question in our mind that this marble is "common variety"—

Common variety in quotes—

by legal definition and that it can be disposed of only under the Materials Sales Act of 1947. We think the Cowan's should be encouraged to purchase the marble under a materials sale contract. We have, accordingly, suggested a course of action for them which we think will be best for them and still be within the requirements of law.

They therefore suggested, and I quote again from the memorandum:

So far as it is consistent with the arrangement projects, we would recommend the following in the event that the Cowan's elect to make a sales application:

- (1) That a sale for this material include at least the 40 acres described above;
- (2) That a sale in the \$100 to \$1,000 range be made at \$0.50 per ton, with the understanding that the Bureau of Land Management may reappraise the material in the event of future or larger sales;
- (3) That the term of the sale be for as long a time up to the two-year maximum for sales in the \$100 to \$1,000 range as the applicants may desire.

Now, if you can apply your theory to the marble-travertine area, then it seems to me you can as logically apply it to other areas as, for example, you have in the case of vermiculite, in which you have refused locatable locations—you and the Bureau of Land Management.

If I may say so, I do not mean this unkindly in any respect. I do not think your suggestion provides a clear-cut access to the solution of this problem, such as might be gotten out of, as the chairman suggested, a combining of these two bills and the desirable features of each, so that Congress does lay down a clear guideline as to what are common varieties and what are not.

There will always be some things in the never-never land, the gray area, of course, and I do not suppose that we can even solve this completely. But we did not have in mind the extension of this and the prudent-man rule and other funny things that have come out of the Department of Interior when we passed our various mining laws.

Mr. GREELEY. May I make one observation, sir?

Senator ALLOTT. Certainly. You can look at this if you wish.

Mr. GREELEY. No, I think that Mr. Puckett, with whom I worked in Alaska, too—I know him and respect him very much—under the guiding decisions, as I understand them, had no choice except to make and reach the conclusions that he reached, the course of action that he outlined.

I do not know that that is particularly indicated by the decisions.

Senator ALLOTT. I should make this clear, I may have confused you. The memorandum from which I just quoted is not Mr. Puckett's letter to the Cowans, but rather a memorandum to the district manager in Canon City from Mr. Puckett, to the district manager there.

Mr. GREELEY. I did misunderstand that.

Senator ALLOTT. I am sure Mr. Puckett's decision in this matter was not made as an arbitrary matter by him, but was made in the Bureau of Land Management for him.

Mr. GREELEY. I need to make the same comment with reference to my statement to Senator Metcalf that I agreed with him about travertine, that it seemed to me that it does have special qualities. I am not the one who is vested with the authority to make that decision. This is just an observation before this committee, sir.

The decision is, properly, vested under the law in the Department of the Interior and the Department of Interior people are the ones who have that responsibility and who do make the decision, and we are guided by their decisions.

Senator ALLOTT. I understand that and this is not in our remarks, any of them, intended as a criticism of you.

Mr. FLORANCE. Mr. Chairman, may I comment just a moment on the problem that Senator Allott described here?

The suggestion that the Department of Agriculture has made actually would avoid the problem of having to meet the competition as described here. Our suggestion would let a person who goes out and with his own endeavor finds one of these deposits, creates a market for it, have a prior right for a lease. He would not have to meet the competition from the outside person.

Senator ALLOTT. But let me point out that your suggestion has one very great defect, and that is after he had done all this and invested all the money and paid the leasehold for the first 2 years, even though he may have a prior right, the basic termination of the lease money that must be paid lies in the Department of Interior, from which he has no appeal except to give up his lease and let somebody take advantage of his work.

Mr. FLORANCE. Well, we would assume, of course, that the 2-year period also would not be a limitation, that a lease under the proposal we have suggested could be made for a long period of time and, of course, it is contemplated that the payment that would be made would be the value of the material in place, allowing the lessee to obtain the full benefit of his own improvement and processing of the material.

Senator ALLOTT. If I may suggest it, and again without being reflective upon any of the particular personnel here, what seems to be forgotten in our big bureaucratic Government is that these people for the most part are people of extremely small means, who are just trying to get ahead under what we have always considered to be the American way of life: That a man who wants to go out and work like a dog and has imagination can make his own way.

Therefore, the minute you put such a man in a position where he has to cope with decisions, either of the Department of Agriculture or BLM or Interior, whoever it may be, that he is lost. He does not have the finances to do it and, therefore, it is the equivalent of just

shutting him off at that point. This is a classic example of the type of people who are doing this work.

They are small people, small operators, with small financial means, just trying to make a living for themselves and, of course, I suppose also sometimes trying to look forward to the future and even build a fortune for themselves.

But this is still permissible, I think, outside of Wall Street. I hope so. And I just want to bring this to your attention, because the minute you put these people in a position where they have to cope with sending a lawyer down here to fight with the BLM or the Department of Interior, you just effectively chop this fellow's head off and he is through.

I think we should not forget this.

Mr. FLORANCE. This is one of the real problems with the provisions of the law as it is today, and this is one of the reasons that we feel that the elimination of the distinction between common and uncommon varieties would be one of the big steps in removing the uncertainties here.

The case you describe is one where a locator went in unquestionably in good faith, I would judge, and made a location. He believed the material to be locatable; the decision which he is struggling with apparently indicates that the material is not locatable.

Had he known at the outset that he could lease this material, that he could get a prior right to a lease for a relatively nominal fee for a long period of time, he would have been able to go right ahead and certainly the suggestion that we make is not intended to shut off the little operator or eliminate the opportunity for people to go in and find these materials and to work them, process them, and make a profit out of them.

We think that our suggestion would actually encourage that.

Senator ALLOTT. What would you say about rhyolite?

Mr. FLORANCE. I am not familiar with that material at all, Senator Allott.

Senator ALLOTT. Well, you go home and get your Webster's Dictionary out. In connection with your comments on this matter, I would appreciate receiving your views with respect to rhyolite. Perhaps rhyolite falls in one of those "grey" areas we have mentioned. But I cannot believe that rhyolite should be classed with pumice, and sand and gravel, and similar materials.

Mr. FLORANCE. Your views most certainly may be in accord with the facts. I do not question them.

Senator ALLOTT. That is all I have, Mr. Chairman.

Senator GRUENING. We have a number of industry witnesses to be heard from now.

Mr. John B. Lonergan, representing Montana Travertime Quarries; the Gilmer family of Minnesota and Arizona; the Johnson family of southern California; the Chas. Pfizer Co. of California, and the California Portland Cement Co. of Arizona and California, will be the next witnesses.

You represent a very interesting list of concerned parties, Mr. Lonergan. Will you go ahead and give your name and title to the reporter? We will be happy to hear you.

**STATEMENT OF JOHN B. LONERGAN, ATTORNEY FOR VARIOUS  
MINERAL INTERESTS**

Mr. LONERGAN. Thank you, Mr. Chairman.

Mr. Chairman and members of the committee, my name is John Lonergan. I am one of the senior partners in the law firm of Lonergan, Jordan & Gresham, with offices at 506 Andreson Building, at San Bernardino, Calif. A major part of my practice relates to the public domain and the Federal mining laws.

On behalf of myself and the clients I represent here today, I wish to express thanks and appreciation to the chairman and members of the committee for this opportunity to testify. We are certainly most grateful to the committee for the opportunity.

In speaking today in support of S. 3485, I represent Montana Travertine Quarries of Gardiner, Mont., owner of unpatented mining claims located for their deposits of travertine, a marblelike building stone; the Gilmer family of Minnesota and Arizona, owners of well established, substantial, granite processing plants at Delano, Braham, and St. Cloud, Minn., and an unpatented claim near Perris, Calif., located for its valuable deposit of gabbro, known commercially as black granite; the Johnson family of Escondido and Perris, in southern California, long engaged in the granite mining business and owners of a claim of black granite near Perris; Chas. Pfizer & Co., Inc., which, in its minerals, pigments, and metals division, is the owner and operator of a number of mining claims variously situated in southern California and Montana, and held for their valuable deposits of limestone, talc, bentonite, and wollastonite, all used as fillers and extenders in the paint and other industries and for other purposes; and California Portland Cement Co., the operator of three large portland cement plants in Arizona and southern California, two of them being in California, and owner of a number of claims deemed valuable because of their limestone and silica deposits.

May I at the outset and before I proceed further state that much of my written presentation which I have filed with the committee somewhat duplicates what has already been stated here, and I would prefer, with your permission, to rely on the fact I have filed with you the statement and that is my formal statement. I would like to make some comment, though, as I go along on the features of it and on the statements which have been made by others here.

Senator GRUENING. Please proceed as you think best. We have no desire to curtail your time or presentation.

Mr. LONERGAN. Thank you. We have heard reference to granite and other materials which are sometimes classified as building stone. I think of them more as ornamental building stone and to give you an idea of the values you are talking about when you speak of those commodities, I would like to refer to the black granite which was produced from the Johnson claim in southern California. It sells or sold at the mine which had been operated for from \$5 to \$6 per cubic foot, unshaped, unprocessed but loaded on cars ready for shipment.

When processed, it is shipped to the Midwest, to Minnesota, and there it goes through a process of polishing, cutting, refining, and then is shipped to a point of consumption or use. In building plate pur-

poses, that particular black granite was used in the Federal office building in Salt Lake City, Utah. The economics of the situation are obvious. The sale at the mine is at about \$50 or more per ton, and the sales prices range from \$35 to \$400 per cubic foot when processed and delivered. The industry dealing with so-called building stone is not a negligible matter.

I might comment next that the mineral business, the development of mining claims and mineral deposits, makes for employment, it makes for the development of communities and the expansion of communities. It provides new products and it develops old products.

In the course of my practice of law, since the so-called common varieties act, section 3 of Public Law 167, was enacted, I have observed some unfortunate and disastrous experiences of bona fide prospectors and miners. It is so hard to sit in an office or to visit your clients in the field and to observe their frustration, their disappointment, their inability to proceed without danger of incurring extreme potential financial liability, because of the uncertainties arising out of the administrative misinterpretations and expansions of a statute which, if we look at the congressional legislative history, was very clear in its intent.

The examples which the committees in 1955 gave of materials which would have special and distinct properties unfortunately were not extensive enough and this is one of the features, I think, of the bill, S. 3485, which is to be highly commended and kept in it if it is at all changed, for it provides guidance in an area where there has been so much uncertainty.

Things have not worked out the way Congress intended as disclosed by its 1955 reports particularly Senate Report No. 554. Something that has not been developed but which should be brought to your attention in your consideration of the statements made here today are the following: The word "stone" has been used.

If we think of stone, we often think of crushed stone, of loose, unconsolidated material. On the other hand, if we think of stone as being rock; namely, consolidated materials, material in place, then we have vastly and terrifically expanded the concept.

I point out to you that limestone, granite, travertine, wollastonite, and gypsum are normally found in place, they are mined by quarrying procedures and crushed and developed. That is rock until it is broken off. Then it becomes stone as far as the concept of stone being loose, unconsolidated material is concerned, but the 1955 act has been applied as though stone meant rock. If that concept is to continue, it should be kept in mind that the nature of the mining industry in its operation in the metallics field has changed. It used to be that you found a vein or a ledge or a lode and you followed it taking from it the valuable material that was there. In recent years, many new mines have been developed as open pit methods covering vast areas of widely disseminated ores and values in rock in place.

If one of the concepts of the Department of the Interior's rulings and the views of the Forest Service were to be applied, I think it could be said that the vast deposits of the copper-bearing ores in Arizona, Utah, Nevada, and Montana would be common varieties, and if that is so, where are we?

It would take very little, it would take one case in my opinion, one unfortunate ruling on hard facts, to extend that principle into that

area, and if that were done, I think we would have havoc in the mining industry.

The need for clarification is pretty obvious. The protest which has come from the industry began way back soon after the 1955 act became law. The matter has snowballed. It takes years for an administrative proceeding to develop through the respective processes into a final decision by the Secretary or into a case which can be considered by the courts. It is absolutely no answer to say that a miner or a prospector or a big mining company has a way to obtain relief through the administrative process. It is not equitable, it is not fair, and it is not true.

To begin with, it is expensive. The little fellow cannot stand it. It is no good to have a means of relief if you cannot take advantage of the process.

Second, it takes time. In a competitive world of today, you cannot stand by while a deposit is lying there and you go through the several processes of, in my experience, 3 to 6 to 7 to 8 to 9 years of obtaining administrative and legal court relief leaving either the property undeveloped while your competition goes on, or risking untold liability by operating the property in the face of uncertainty of title.

I think it is true that when anyone operates a material deposit charged as being a common variety on the theory that the deposit is not a common variety, if that individual is wrong, the potential financial liability is horrible, because the statute never runs against the Government. There is no telling what the measure of damages will be, although you can be sure that one measure of the damages will be the extremely expensive defense of a lawsuit brought by the Government lawyers.

Financing of a deposit which is questionable because of its common variety status is impossible. This holds back development, holds back employment, and all suggests that certainty, absolute certainty, or as close to perfection in that regard as possible should be had and should not await the development of any reports or statutory relief as a result of the studies by the Public Land Law Review Commission.

I suggest that that latter relief, if there is any—I hope there will be—will come many years from now. The industry cannot wait. I think one other thing that should be called to your attention and is in the forefront of my mind at the moment is this: People talk as though section 3 provided a statement or an indication of what could be located as a mining claim and what could not be located as a mining claim in the field of these common materials. This is not true. Section 3 states that common varieties of the named materials were removed from the category of those locatable. It does not say anything about the continuing legal requirement that is absolutely present in all of these occasions that those deposits to be located must also be valuable mineral deposits within the meaning of the mining law.

This is known to the Department and the Forest Service and to the industry, including all prospectors or miners.

There is another suggestion. The element of good faith is also an absolute requirement in the location of a mining claim. This, too, along with value, is required, and consequently, one who locates a deposit of sand, stone, gravel, pumice, or pumicite, if he hopes

that it is an uncommon variety, must still have been acting in good faith and must be able to show that it was a valuable mineral deposit within the meaning of the mining law. The draft of Senate bill 3485 takes care of that and expressly refers, I believe, to the language that it must be a valuable mineral deposit within the meaning of the mining laws.

I might say, and I do this not facetiously at all, that it would be helpful if the people who decide for Government agencies were to take a turn, perhaps a sabbatical leave, in the field working for a prospector, a miner, or a mining company, to realize the practical problems in the day-to-day operation before they suggest changes in the mining law or in its construction. I do this respectfully. I think it would be very helpful. I know it is impossible, but I think that it does help to know that there are practical problems.

My gray hair, they tell me, in my family, came from one mining lawsuit involving property at Mountain Pass in San Bernardino County, Calif. There is an example of something, it involved rare earth. If they could not have gone ahead with their development and their study and their experimentation because of uncertainty of the nature of the deposit as a common variety, let us say, where would have been the progress that has been made within the last year or so. The tremendous increase in the quality of color television tube activity and performance has been attributed in great part to the development of a rare earth.

I would like to refer briefly, if I may, to the statement by Mr. Cavanaugh, for whom I have a personal admiration. He and I have differed in the past, starting in 1961. I think that his statement ignores the history of the bills leading to the 1955 act. I am glad to know that he states that the provision does need serious and radical amendment.

I think that there is no reason to delay the relief to the industry for failure of the agencies to make positive, definite suggestions of legislation. Starting in 1957, and I have referred to it in my formal statement, the Department, by the director, has indicated that there was an uncertainty and an inability to interpret the statute and later on there have been requests, I am sure, made to the agencies for suggestions as to legislation. I know of no suggestions that have been in the form of bills and excepting the one with respect to the recording of mining claims, which was mentioned here earlier.

The statement of Mr. Greeley for the Forest Service—I do not know Mr. Greeley—but it impresses me as being a bid for the maintenance of the status quo, at least, and an ultimate change to the leasing process.

Gentlemen, the leasing process is no relief to a prospector or miner who wishes to go out and develop a body of material which he finds. It takes money, it takes time, it takes extensive development on building stone just as well as anything else, in most cases for real commercial operation, and this cannot be done safely or satisfactorily under a leasing system.

You cannot finance large plants or mining deposits, mineral deposit developments, on uncertainties, and consequently, what is needed is certainty; it is certainty in tenure; it is certainty that is provided by the basic 1872 mining law as clarified by such a statute as is proposed by the bill S. 3485.

I deeply appreciate the opportunity to appear and I am perfectly willing to answer any questions that might be asked.

Senator GRUENING. Mr. Lonergan, you have made a very effective presentation.

Do you happen to know what the current status of adjudication of the travertine claim is? Has the Secretary of the Interior made any reply?

Mr. LONERGAN. I am not in a position to answer that, Mr. Chairman. I believe it is pending in the Department and that is all I know. If I may, I will ask Mr. Roth, who is here for the Montana Mining Association.

Senator GRUENING. Yes. Mr. Roth, do you know?

Mr. ROTH. Yes, Mr. Chairman. That matter is in abeyance right at the present time. I believe pursuant to this subcommittee's interest in this particular area that inaction is probably the rule at the moment, rather than inactivity.

Senator GRUENING. Inaction is sometimes not for the moment, but over a longer period of time.

Senator Allott?

Senator ALLOTT. I think Mr. Lonergan's statement has been very helpful. I think it helps to have someone here who has had extensive experience in dealing with the problems that this raises. He points it out to us and in this category, Mr. Lonergan, since nobody seems to know about rhyolite here except me, would you consider rhyolite in the common variety classification?

I have no vested interest in this material, I just happen to think it is a beautiful stone.

Mr. LONERGAN. I think it falls in the same category, in my personal thinking, and here again I am outside my profession but I think it would be classified somewhat like granite or marble or travertine in that it is a stone, it is found as a part of the earth's crust normally, and could be, if processed, a very beautiful thing. It probably could be found in many places as a beautiful stone.

Senator ALLOTT. Well, we will try to get something out of the Department on it.

Mr. LONERGAN. I am afraid I am outside of my professional training.

Senator ALLOTT. Thank you very much.

Senator GRUENING. Senator Metcalf?

Senator METCALF. I think that you have made a very helpful statement and it will contribute to the consideration that the committee gives to this bill.

Are we going to get into trouble in maybe some other area by the specific enumeration of some of these special varieties? For instance, suppose we had left rhyolite out and it should be considered as a part of the same—the same as marble or black marble or travertine—are we going to run into the rule of statutory interpretation that the mention of one thing eliminates the other?

Mr. LONERGAN. I think it would be classified as a stone.

Senator METCALF. And would be included even though it were not specifically mentioned?

Mr. LONERGAN. Even though it were not mentioned, yes. There are many things that are not mentioned in that bill, but yet are valuable mineral commodities.

Senator METCALF. Actually, is not what we are trying to do here to lay down some new guidelines for the administration of the Common Varieties Act, and point out to the Forest Service and the Bureau of Land Management that the Congress intended that these rather uncommon stones should be locatable? Is that not what we are trying to do?

Mr. LONERGAN. As I understand the bill and your statement in offering it, Senator, it was intended to clarify and to express the intent of the Congress as it existed in 1955.

Senator METCALF. That is right.

Mr. LONERGAN. And which has been misinterpreted.

Senator METCALF. Distorted.

Mr. LONERGAN. Distorted, to use your word, and overextended and as I have suggested rather dangerously to the entire mining industry by the interpretations and actions of the Department.

Senator METCALF. Well, now, Mr. Cavanaugh and Mr. Greeley—believe me, I share your regard for both of them—have been fine witnesses and I think they are outstanding administrators. I know Mr. Cavanaugh was originally from Montana and is an outstandingly good lawyer. He has pointed out that we have left some gray areas. But have we not, by clarifying the definitions, given some direction to both the Secretary of the Interior and the Secretary of Agriculture as to how to apply the law to these gray areas?

Mr. LONERGAN. I think that the bill in its present form does almost everything that could be done in that regard. I think it is ideal.

Senator GRUENING. We are glad to have your testimony on that.

Senator ALLOTT. Mr. Chairman, could I ask the gentleman one other question?

Senator GRUENING. Yes.

Senator ALLOTT. You mentioned the situation with respect to the copper deposits. A lot of people who go out and prospect are not necessarily mining engineers even in this day and age.

What could occur, and would you comment on the question you raised, whether you intended to raise it directly or not, with respect to a person who had filed a location on what is without question a valuable mineral. Then it develops that as a result of circumstances or highways or any one of a dozen things that might happen, the chief value of the location is not because of the original filing but because of the common varieties of sand, stone, pumice, or something like that which was also found on this particular area? What would be the situation in this instance? Suppose the patent had not been issued at the time this became obvious and the man had taken out 50 times as much dollar value of gravel or some other common variety as he had taken out of the locatable mineral? Where would we find ourselves in such a situation and does it need attention in this bill?

Mr. LONERGAN. I think there are a number of aspects of the mining law that need attention, including that one. I am not prepared to give a legal opinion on it, but I know one thing, it would erupt into a lawsuit for certain because of the uncertainty in it.

Senator ALLOTT. In other words, it is your feeling that probably the Bureau of Land Management would refuse a patent and then you would get into the lawsuit you are speaking of?

Mr. LONERGAN. I misunderstood your question. I think that it would be certain under present administrative rulings and practices

that the Bureau of Land Management, the Department, and, if the Forest Service were involved, the Forest Service, would take the view that the claim was not valid.

Senator ALLOTT. I have just had called to my attention by my legislative assistant a proviso in the Common Varieties Act, section 611, which is as follows:

*Provided, however,* That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit.

But you still believe that this leaves an area of much confusion?

Mr. LONERGAN. Yes, sir, I do. The example, I believe given—it is either in the Senate or House report on the 1955 bill—was the finding of gold in the sand and gravel of the bed of a stream. That is a typical example.

If the Bureau of Land Management takes the view that the sand and gravel—all sand and gravel is a common variety and therefore not locatable—unless the locatable mineral provided a valid discovery under the mining law with respect to the other minerals contained in it, there would be no help to the owner from all of those facts.

In my view, the fact that there was useful and valuable sand and gravel on the claim plus useful and valuable other mineral, and the other mineral was not sufficient of itself to support the claim as a valid mining claim, under the current rulings of the Bureau then the entire claim would fall.

Senator ALLOTT. Thank you very much, sir.

Mr. LONERGAN. Mr. Chairman, if it is a matter of normal procedure, may I ask that the printed record of the subcommittee hearings in Butte and Washington last fall be included in the record here on S. 3485?

Senator GRUENING. Those hearings already have been incorporated by reference.

Mr. LONERGAN. Thank you, sir.

I have, and would like to offer to the subcommittee, a statement dated June 25, 1966, by John B. Ahern, vice president of the Montana Travertine Quarries.

Senator GRUENING. We will be glad to include it into the record after your testimony.

Mr. LONERGAN. In my statement, which I have not read, because it is so repetitious of much that has been said, is a reference to a letter of February 28, 1957, written for the Director of the Bureau of Land Management, to a Mr. Chad F. Calhoun, of the Kaiser Steel Corp., and I offer a copy of that letter for the convenience of the committee, if it is not already in the record.

Senator GRUENING. It will be included following your prepared statement if it is not in the record.

Mr. LONERGAN. Finally, in my statement, I referred to a letter written for the Director to a Mr. George W. Nilsson of Los Angeles, and I do not believe that that is in the record of the earlier hearings.

Senator GRUENING. What does that deal with?

Mr. LONERGAN. The same subject as the Calhoun letter to the effect that it is difficult to define a common variety of any material in such a way that it would not be subject to some misunderstanding.

Senator GRUENING. We will be glad to include it after the other letter submitted.

Mr. LONERGAN. Again, sir; I thank you and the members of the committee.

Senator GRUENING. Mr. Lonergan, your full statement and the letters submitted will be printed at this point.

Thank you for your testimony.

(The data referred to follow:)

STATEMENT OF JOHN B. LONERGAN, ATTORNEY FOR VARIOUS MINERAL INTERESTS

My name is John B. Lonergan. I am one of the senior partners in the law firm of Lonergan, Jordan & Gresham with offices at 506 Andreson Building, San Bernardino, California. A major part of my practice relates to the public domain and the Federal mining laws.

On behalf of myself and the clients I represent here today, I wish to express thanks and appreciation to the Chairman and members of the Committee for this opportunity to testify. We are most grateful for this hearing.

In speaking today in support of S. 3485, I represent Montana Travertine Quarries, of Gardiner, Montana, owner of unpatented mining claims located for their deposits of travertine, a marble-like building stone; the Gilmer family of Minnesota and Arizona, owners of well-established, substantial, granite processing plants at Delano, Braham, and St. Cloud, Minnesota, and an unpatented claim near Perris, California, located for its valuable deposit of gabbro (known commercially as black granite); the Johnson family of Escondido and Perris, in southern California, long engaged in the granite mining business and owners of a claim of black granite near Perris; Chas. Pfizer & Co., Inc., which in its Minerals, Pigments and Metals Division, is the owner and operator of a number of mining claims variously situated in southern California and Montana, and held for their valuable deposits of limestone, talc, bentonite, and wollastonite, all used as fillers and extenders in the paint and other industries and for other purposes; and California Portland Cement Company, the operator of three large portland cement plants in Arizona and southern California, and owner of a number of claims deemed valuable because of their limestone and silica deposits.

S. 3485 would amend Section 3 of the 1955 Act. The 1955 Act is known as the Multiple Use Act. Section 3 of that Act is ordinarily known as the common varieties law and in my testimony I shall refer to it as the common varieties law or as Section 3. The intent of the common varieties law is well known to this Committee. That intent was succinctly stated by Senator Metcalf at the time he introduced S. 3485 for himself and Senator Gruening. The legislative history makes abundantly clear that the purpose of the law was to prevent the abuse and misuse of the Federal mining laws. Persons who had no interest in mining were getting free public land for summer homes, fishing camps and the like by filing spurious mining claims. These spurious claims were filed under color of discovery of sand, stone, gravel and like substances. Section 3 was designed to cure that situation. But, there never was any intent to change the law so far as bona fide prospectors and mining operators were concerned.

The full Committee made this plain when it reported out the bill which became the 1955 Act. Senate Report No. 554, (84th Cong., 1st sess., p. 2) states:

"At the same time, the measure faithfully safe-guards all of the rights and interests of bona fide prospectors and mine operators. In no way would it deprive them of rights and means for development of the mineral resources of the public lands of the United States under the historic principles of free enterprise and private ownership of the present mining laws."

In discussing the background of the measure, Senate Report No. 554 (p. 3) noted that "our mining industry is under the constant necessity of exploring for the developing additional sources of new and old minerals to meet the ever-increasing requirements of our national security and industrial economy."

The executive department reports in support of the 1955 measure, included in Senate Report No. 554, clearly disclosed the belief that the provisions would strike at the reported abuses of the mining laws, without interfering with the activities of bona fide prospectors and miners.

Interior's report noted that the national interest in encouraging the discovery of minerals dictated that the mining industry should have a continuing opportunity to locate claims, to mine minerals on those claims, to discover and develop commercial deposits and, if fortunate, to make a profit. This report of the Department, in noting the abuses at which the measure was designed to strike, pointed out that many claims had been based on deposits of sand,

stone, gravel, etc., which, although technically of sufficient value to justify a location, were actually of minor worth compared to other natural resources of the land.

The Under Secretary of Agriculture similarly reported, saying in part that the Department of Agriculture desired to encourage legitimate prospecting and effective utilization and development of the mineral resources of the national forests, and stated (S. Rept. No. 554, p. 17): "We would not favor legislation which would interfere with such development of minerals nor work hardship on the bona fide prospector or miner." He further stated in his report (S. Rept. No. 554, p. 18) that the measure "will correct deficiencies in the mining laws and prevent many of the abuses by other than bona fide miners, but it will not obstruct or interfere with bona fide mineral prospecting, mining, and development."

During the debate on the bill, Senator Anderson stated (Vol. 101, Part 7, p. 9334, Cong. Rec. June 28, 1955) that effort had been made to draft a bill that would meet a situation that was rapidly developing into a national emergency and yet at the same time not interfere with the existing rights of bona fide mining activities, either then or in the future. In explaining the bill, he said that, among other things, the bill would provide "that deposits of common varieties of sand, building stone, gravel, pumice, pumicite, and cinders, on the public lands, where they are found in widespread abundance, shall be disposed of under the Materials Act of 1947 rather than under the mining law of 1872."

But this is not how things have worked out. As a practical matter, Interior and the Forest Service have administered the common varieties law almost as a prohibition against mining claims on the materials listed in Section 3. This is accomplished by imposing standards and tests which violate the intent and purpose of Section 3.

Senator Metcalf made an outstanding exposition of the manner in which the statute is frustrated by the unwarranted and arbitrary standards and tests applied by the administrative agencies. (Vol. 112, Cong. Rec. 12109-9, June 9, 1966.) I subscribe fully to the Senator's views and respectfully request that his statement be made a part of the record. In line with his expressions let me cite stone as an example.

The correct test should be whether a particular deposit of stone is *common* stone. But as pointed out by Senator Metcalf this is not the test Interior applies. An individual files a claim on a deposit of travertine. Travertine is a beautiful marble-like stone. It is more expensive than many marbles. Clearly travertine is not a common stone. Neither is limestone a common stone. If Interior applied the test intended by Congress, it would ask, is travertine or limestone a common stone? The answer is apparent. But Interior does not apply the obvious test intended by Congress. Interior asks, is this a common variety of travertine? Is this a common variety of limestone? On that basis Interior rejects the claims saying "Yes, these are common varieties of travertine, or limestone", as the case may be.

In the same fashion Interior administratively negates the exception in Section 3 which permits the location of deposits of the listed materials if such materials "are valuable because the deposit has some property giving it distinct and special value." House Report No. 730, 84th Congress, 1st sess. (1955), on the bill which became the 1955 Act, specifically refers to the language of this exception as excluding "materials such as limestone, gypsum, etc., commercially valuable because of 'distinct and special' properties". Nevertheless, Interior rules that "distinct and special value" does not mean value over and above that found in common stone, but rather means value over and above that found in stone of the particular category. Again, using limestone as an example, Interior's view is that whether a particular deposit of limestone has "distinct and special value" depends on whether it has value over and above that found in limestone generally. In this connection Interior limits itself to intrinsic factors such as physical characteristics and chemical composition and excludes extrinsic factors such as location, accessibility, market and demand, all related to commercial value.

Interior's position was summarized by the Solicitor, Department of the Interior, in a statement of September 24, 1965 before this Subcommittee, as follows (p. 8):

"\* \* \* We have interpreted a common variety as a common variety of a particular type of mineral. We have interpreted a 'distinct and special value' as a value not commonly found in a particular type of mineral. Most important of

all, we have concluded that only intrinsic values may be considered in determining whether something is a common variety."

These administrative interpretations, coupled with the lack of clear guidelines and the departmental policy of determining whether deposits are common or uncommon on a case by case basis, have generated a storm of justified protest and complaint from members of the industry, large and small. The Department of the Interior is clogged with costly mining contests in pursuance of the "case by case" policy. Prospectors and mine operators have the choice of surrendering their claims or assuming the burden of expensive mineral contests of long duration. The lack of definitive classifications and standards, the uncertainties of title and the threat of suit by the United States for damages if mining claims are worked before final adjudication, have virtually frozen investment and development of mineral resources. Bona fide mineral prospectors and mining operators do not know where they stand. Financing is wholly risky or impossible. Operators cannot use their claims except at the peril of a federal claim for damages.

The point is that corrective legislation now is needed to mark unmistakably clear guidelines expressive of the original intent of Congress. In no other way can the rights and interests of bona fide prospectors and mining operators be protected. S. 3485 would accomplish that goal.

The administrators have made repeated admissions that legislation is needed. They confess that they can find no satisfactory definition of "common variety" as used in Section 3. In a letter dated February 28, 1957 from the Bureau of Land Management to Chad F. Calhoun, Vice President, Kaiser Steel Corporation, the statement was made that "as you know it would be very difficult to define a 'common variety' in such a way that it would not be subject to some misunderstanding." The same statement was repeated in a letter dated October 11, 1957 from the Bureau of Land Management to Mr. George W. Nilsson, 510 West 6th Street, Los Angeles, California.

Similarly, the Secretary of the Interior, the Secretary of Agriculture and the Solicitor of the Department of the Interior all agree that the common varieties law needs amendment. The Acting Secretary of the Interior by letter of November 2, 1961, informed the Chairman of the House Committee on Interior and Insular Affairs that "We believe that legislation to clarify the meaning of 'common variety' in the Section 3 of the Act would be helpful. Several questions about the meaning of the term [common variety] have been asked, and only by legislation amending Section 3 may they be answered conclusively." (See hearings before this Subcommittee on P.L. 167, 84th Cong., pp. 125-126, September 24, 1965.) Secretary of the Interior Stewart Udall joined in this view in his letter of November 22, 1961 to Senator Engel and his letter of the same date to Senator Kuchel.

The Solicitor, Department of the Interior, testified before this Subcommittee that " \* \* \* I must emphasize that I believe that this problem will continue to be controversial until the present law is amended." Hearings, *supra*, p. 120.

We respectfully urge that S. 3485 be given favorable consideration.

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STATEMENT OF JOHN B. AHERN, VICE PRESIDENT OF MONTANA TRAVERTINE QUARRIES,  
GARDINER, MONT.

Senator Gruening, Members of the Sub-Committee on Minerals, Materials and Fuels, I am John B. Ahern, Vice-President of Montana Travertine Quarries, a Montana Corporation, located at Gardiner, Montana. We are producers of Travertine building stone, one of the worlds most desired construction products.

My views on the administration of Public Law 167 are well known to the members of this committee and I do not intend to attempt a review of all of the testimony and correspondence we have had.

The producers of building stone along with the rest of the mining industry have always been in favor of the concept of multiple use of the surface of unpatented mining claims and we support laws that will control those who abuse the mining laws. At the same time we feel that the regulatory agencies should respect the rights of, and protect, the legitimate mine operator.

It is indeed unfortunate that the definition of "common varieties" has been the cause of much hardship within the mining industry. Many small producers have been coerced into relinquishing their rights under the mining laws and have been forced to accept leases under the Material Disposal Law, which have, in

effect, so restricted operations that they are practically out of business. These persons entered into leases because it was felt that, "You cannot fight the Government".

Those of us who have been involved in this dispute with the several government agencies during the past few years have worked long and hard, and at considerable expense, in an attempt to find a solution of this problem that would protect the mining industry and at the same time serve the interest of the public.

S. 3485 is the result of our efforts and I think this is a god law. It will adequately define "common varieties" and so amend Section 3 of Public Law 167 that the intent of Congress will be carried out; That is, as stated by Senator Anderson, "to permit the multiple use of the surface resources of our public lands, to provide for their more efficient administration, and to amend the mining laws to curtail abuses of those laws by a few individuals who usually are not miners. At the same time, the measure faithfully safeguards all of the rights and interests of bona fide prospectors and mine operators. In no way would it deprive them of the rights and means for development of the mineral resources of the public lands of the United States under the historic principles of free enterprise and private ownership of the present mining law."

In addition to the problems presented by the interpretation of Public Law 167 and the definition of "common varieties", there are other problems that face the small mine operator in a dispute with a government agency, not the least of which, is money.

As stated above, many small operators have been forced to accept a leasing arrangement to lease the property in question under the Materials Disposal Law. The payments to be made under these leases are generally excessively high, and so restrictive as to the volume that may be produced under the lease, that the operator is unable to be competitive and thus must eventually get out of the building stone business. In our case the suggestion was made that our royalty payment should be 5% of gross sales. In addition when we had paid the government \$1,000.00 in royalties during any one year we would be required to make a competitive bid on the property in order to retain the lease. This would mean that we would be restricted to a production of 750 tons of stone per year. Under this proposal we could never hope to recover our development costs which to date exceed \$20,000.00 on Happy Jack No. 3.

I have discussed this problem with several stone producers and I have not found any two leases that are identical. Apparently leases are made on a basis of whatever the traffic will bear.

At no time did we consider a lease. We insist that we have a valid placer mining claim and that the Forest Service is in error in its interpretation of the common variety clause of Public Law 167.

When a dispute arises and a contest is started through the process known as administrative procedures the financial burden placed upon the miner is unbearable. In our case our lawyers estimated legal fees would be approximately \$11,000.00. In addition there would be travel expenses and expert witness fees. Frankly, gentlemen, the prospect of such unreasonable expenses had a strong influence on our decision to seek the aid of Congress to secure corrective legislation.

Referring to the hearing held in Washington on September 24, 1965, page 128, (Mr. Frank J. Barry described the administrative procedure as a "quasi-judicial proceeding". He cast the Forest Service in the role of an advocate with an attitude of hostility who would carry a case through a series of appeals to the Secretary of Interior. As Mr. Barry stated, the Forest Service would take the case to court, "and the court is the Department of Interior". No small mine operator can afford to expend the sums of money required in such a so-called judicial process. As a matter of fact mining companies with large financial resources have the same problem as reported by Mr. E. B. Connors, representing Kaiser Cement & Gypsum Corporation at the hearings held in Butte on June 8, 1965, when he stated, on page 83, "we have spent 9 years and over a half million dollars on a project that has not yet gotten off the ground, due entirely to the manner in which our mining laws are being administered".

About two years ago Secretary Udall wrote to Congressman Olsen of Montana, and among other things, made the statement that in lieu of the relatively small cost of a hearing, the Montana Travertine Case should go to a hearing. I ask this question. These small costs are relative to what? My assets, or the budget of the Department of Interior? Believe me, there is a real difference.

I know Senator Gruening, that you have been disturbed over the delays that have occurred in the Montana Travertine Case. I have asked for these delays

for several reasons, including a change in legal counsel. I have had many problems, both business and personal, and I simply have not had the money to carry our case to a successful conclusion.

I urge the members of this Committee to favorably consider S. 3485 and to submit this Bill to the Senate as written, with a "do pass" recommendation. In my opinion S. 3485 adequately defines "common varieties", and more importantly, names the specific minerals that shall *not* be deemed "common varieties". This is accomplished without interfering with the multiple use concept of Public Law 167.

Thank you gentlemen for the privilege of presenting these few remarks for your consideration.

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DEPARTMENT OF THE INTERIOR,  
BUREAU OF LAND MANAGEMENT,  
*Washington, D.C., February 28, 1957.*

Mr. CHAD F. CALHOUN,  
*Vice President, Kaiser Steel Corp.,  
Washington, D.C.*

DEAR MR. CALHOUN: I have read your letter of January 29, with interest and appreciate your concern over the possible misinterpretation of the definition of "common varieties" of minerals as given by footnote 2 on page 1 of the departmental regulations for Public Law 167.

First let me assure you that it was not our intention to imply that limestone, gypsum or other like material possessing "distinct and special" properties would be excluded from the operation of the mining laws and placed under the Materials Act of 1947 (61 stat. 681). We feel that these materials when they possess special properties that make them useful in the production of cement, metallurgical or chemical grade limestone, etc., should remain under the Mining Laws of 1872. While the language used in the definition of "common varieties" may be subject to misinterpretation I feel we are in complete agreement with the statements you referred to in House Interior Committee Report No. 730 and Senate Interior Committee Report No. 554.

As you know, it would be very difficult to define a "common variety" in such a way that it would not be subject to some misunderstanding. To amplify on the stated definition in the regulations, I would further say that a "common variety" of material is one that has no special physical or chemical properties which differentiate it from other deposits of such material so as to give it a special and distinct value. You will note that I have stressed the chemical or physical properties of the material itself. This was done to differentiate from geographical location as it is my opinion that location alone would not be a determining factor as to whether a material is a "common variety" or not. Certainly under our definition of the term limestone, quartzite or other material valuable for metallurgy, limestone suitable for cement making, stone suitable for cutting into blocks or naturally cleavable into slabs suitable for building, or silica sand suitable for glass manufacture, foundry use, for example, would not be a "common variety". Such materials would remain subject to location under the mining laws upon a valid discovery and would, as in the past, be subject to patent upon proper application.

Sincerely yours,

L. E. HOFFMAN  
(For the Director).

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DEPARTMENT OF THE INTERIOR,  
BUREAU OF LAND MANAGEMENT,  
*Washington, D.C., October 11, 1957.*

Mr. GEORGE W. NILSSON,  
*Los Angeles, Calif.*

DEAR MR. NILSSON: We are enclosing two copies each of Circulars 1921 and 1961 containing regulations issued under the Multiple Use Act of July 23, 1955 (69 St. 367), and the Disposal of Materials Act of July 31, 1947 (61 Stat. 681).

Section 185.121 of Circular 1961 defines common varieties of minerals. As you know, it would be difficult to define a common variety of any material in such a way that it would not be subject to some misunderstanding. However, if the deposit of stone you are interested in developing has no special physical or

chemical properties which differentiate it from other deposits of such material so as to give it a special and distinct value, it would be a common variety. For example, stone used for road surfacing, fill or ballast would be considered a common variety.

Stone, commercially valuable because of distinct and special properties, such as limestone suitable for cement making or of metallurgical or chemical grade, or stone suitable for cutting into blocks or naturally cleavable into slabs for building purposes, or stone suitable for monumental work would not be considered common varieties.

Sincerely yours,

MAX CAPLAN  
(For the Director).

Senator GRUENING. Our next witness is Mr. Urban Roth, of Butte, Mont., representing Southwest Montana Mining Association and Montana Mining Association. Please proceed in your own way.

**STATEMENT OF URBAN L. ROTH, ON BEHALF OF THE MINING ASSOCIATION OF MONTANA, THE SOUTHWESTERN MONTANA MINING ASSOCIATION, GEOLOGISTS FOR THE MONTANA BUREAU OF MINES, AND THE MONTANA STATE PLANNING BOARD**

Mr. ROTH. Mr. Chairman, Senator Metcalf, my name is Urban L. Roth. I am a junior partner in the firm of Poore, Poore, McKinsey, and Roth, of Butte, Mont. I represent at this hearing the Mining Association of Montana, the Southwestern Montana Mining Association, Geologists for the Montana Bureau of Mines, the Montana State Planning Board, and numerous small miners and prospectors in Montana.

With the chairman's permission, I would like to digress from my written statement, because I feel that so many of these areas that I covered in the written statement have been covered so well by members of this subcommittee and by other witnesses.

Senator GRUENING. Your written statement will be included in the record at the end of your oral comments.

Mr. ROTH. Thank you very much, Senator.

If I may, I would like to comment briefly on Senator Allott's statements with regard to the vast, unexploited resources of the Big Sky country of Montana, Utah, Nevada, California, Colorado, and Idaho, and his statement that the known reserves of these resources are actually at the present time greater in extent and in amount than the vast amount of wealth, the tremendous amount of material already withdrawn from the rich western region.

So instead of stopping or emasculating the economy in this particular area or the method by which this vast mineral wealth can be uncovered and thus sterilizing the mining economy by a leasing method, I submit to this subcommittee that it is important that we adhere to those tried and true methods of exploiting this mineral wealth as I believe this committee intended when it enacted Public Law 167.

It has been clear from the reports made to this committee in the Butte hearing and in the Washington hearing, also in the administrative news with regard to what preceded Public Law 167, that the existing mining law was not to be changed except in the specific areas provided for in Public Law 167.

A valuable mineral discovery was open to exploration and exploitation, and Congress intended that this vast wealth that the West still has to offer was still open to discovery and exploration. However, with the advent of the departmental decisions in the common-variety area, certain areas of this vast mineral wealth were actually foreclosed to discovery, and the mining economy in this particular area was completely stopped.

Now, as pointed out by Senator Metcalf, I believe very well, Congress in 1955 really wanted to tell the departments in effect what areas were not locatable and confusion arose over that. Now Senate bill 3485 is really a redefinition of the intention of Congress in 1955. The original intent of Congress was not followed, as I understand it, and certainly does not reflect what was said in the reports prior to enactment of Public Law 167.

So, Senate bill 3485 gives us the guidelines by which this confusion and this misinterpretation of Public Law 167 can be terminated. If we, for example, take certain portions of the bill and consider them with language used by witnesses at the Butte hearing and also statements made by members of the Government agencies, I think we can find that the proposed bill does supply the guidelines that geologists at the Butte hearings, for example, and department people have advanced.

For example, this statement appears from a letter in 1964 from L. E. Hoffman, who was acting for the Director of the Bureau of Land Management at the time:

I would further say that a common variety of material is one that has no special physical or chemical property which differentiates it from other deposits of such material so as to give it a special and distinct value.

Now, Mr. Chairman, compare this with the language in your and Senator Metcalf's bill, particularly the reference to physical or chemical properties. This is precisely the type of definition that the Bureau adhered to, at least in a letter, in 1964.

Further in the letter, they stated:

You will note that I have stressed the chemical or physical properties of the material itself. Certainly, our definition of the terms "limestone, quartzite, or other material value for metallurgy, limestone suitable for cement-making, stone suitable for cutting into blocks, or naturally achievable into slabs suitable for building, or silica sand suitable for glass manufacture, foundry use," for example, would not be a common variety.

So in a letter in 1964, by Mr. Hoffman, he agreed with you Senators that the physical and chemical properties of a stone or rock did distinguish it from a common variety. Based upon that letter, and I assume letters similar to that, we would be in agreement with, at least, that Government agency in this particular area.

Another thing the bill does is do away with the tests that use or useful necessity for a common purpose or application shall not classify a material as a common variety.

Now, this to me really makes sense. It seems to me that the fact that you might use a highly rare and valuable marble to face a building or for the construction of steps should not in any way have any relevancy to whether or not it is common or uncommon. The ultimate use really does not have anything to do with it. We could draw out the test used by the Department of the Interior in its decisions to its logical extreme

and replace marble blocks with gold bricks. While the example may be absurd, I believe that, in drawing a test out to its logical extreme, the fallacy of the test is revealed. I think the fallacy of this usefulness test or the end-use test is revealed when we draw it out to its logical conclusion.

Then further on in the proposed act, we have guidelines, as you suggested, Senator Metcalf, that certain types of stone be not common varieties so long as they possess certain qualities. Now, it does not mean all limestones or all granites. It means, first of all, a valuable deposit of the material, as was pointed out by Mr. Lonergan, and also it must possess these qualities that are provided for in the act. This certainly differentiates it from the common—what would fall under a common classification of rock or stone.

Finally, we are given a vast body of interpretative help by that portion of the bill which provides that materials used in this act shall be under and applied in the meaning they have in commerce and the construction and mining industries.

I believe the difficulty of applying this to the grey areas is somewhat obviated by reference to these well-recognized terms. Some of the fears that were adverted to by department people really would disappear in view of the terms that we could use in our efforts to go into these grey areas that are not specifically provided for.

In regard to the leasing that has been suggested, I believe, as all of us know, some of the lower grade ore deposits and rock deposits are at very most marginal, and if we include these marginal deposits which require vast amounts of capital and large numbers of men, such as the Butte facilities of the Anaconda Copper, with a royalty and a lease, you have effectively shut off many avenues of economic expansion.

I believe that all of us recognize, both department people and industry people, and Congress, that a change and amendment in the existing law is needed.

One group suggests that we do away with mining locations and the law of 1872 that has meant so much to the economy of our country. I respectfully submit to this subcommittee that that is a drastic solution not called for. It is a solution not needed. I do not think we have to fear that the evils of the past will be revisited by spurious claims in view of the quasi-title procedure that the administrative agencies are armed with, but I do think we have to fear that the tremendous economic expansion of the mineral wealth of the West will be stymied.

I think we have this to fear. And whatever evils crop up in the amendment to this law—and I hope there will be an amendment to Public Law 167—certainly can be cured with remedial legislation. I knew the watchguards of the public lands, the Department of Agriculture and the Department of the Interior will be zealous in their guarding of our national wealth and our national lands to see that these evils will not be revisited.

However, how can we spur on an economy once it has been stopped?

I respectfully submit to this committee that it urge adoption of the bill in some amended form, perhaps by wedding some of its provisions with the provisions of S. 2281 in the hopes that a good, advanced piece of legislation will result which industry can live with

and which the Government can live with and which will insure that the public lands will not be wasted.

Senator GRUENING. We would be very glad to have you point out what features of the two bills you would like to see combined.

Mr. ROTH. I believe that the two departments that have primary responsibility for administration of public lands want to insure—and they properly should—that the people's heritage; that is, the public lands, are in some way safeguarded. I think we could look at the features of Senator Cannon's bill and if they are workable and do present a solution in that particular area, they could be, as you suggested, wedded with the provisions of yours and Senator Metcalf's bill.

Senator GRUENING. Senator Metcalf, do you have anything to add?

Senator METCALF. Well, I think you have made an outstandingly good statement, as you did in the Butte hearings, and contributed to our understanding of the problem.

I have gone over Senator Cannon's bill, and it proposes some rather drastic and radical changes in the mining law. For instance, what would you say to subsection (i) :

Notwithstanding any other provision of law, a patent for any mining claim located after the effective date of this section shall be issued only after payment to the Secretary by the claimant of the fair market value of the surface estate only, as that value is determined as of the date application for patent is filed.

That would mean payment for surface values as a condition for patent under the mining law.

Another provision reads :

Title to the lands patented under this section shall revert, if within 5 years there have been no substantial mining operations or if within 25 years prior to the removal of all the mineral material the lands are devoted to some other use.

I know Senator Cannon is sincerely concerned about the continuation of the principles behind the 1955 law; it is his desire to prevent the abuse of public lands under the mining act; but I fear he has gone a little bit further than we anticipate to be necessary in a minor amendment to the Common Varieties Act.

I would like to go back to the point you have expounded. It seems to me also that the Congress said to the two large agencies which administer our public lands, "We want to get rid of these abuses and we do not want to have motels and bars and all these things as a result of filing mining claims on land that does not contain minerals."

"But," Congress said, "we want to continue the 1872 act in effect just as it has been and as it has contributed to the economy of the Nation with respect to legitimate mining enterprise. We feel that you can administer it that way." I do not think they have done so. They have not carried out the legislative intent.

So now we come back with clarifying definitions that they have said they need. Mr. Cavanaugh here and out in Butte, and some of his associates in the Interior Department have said that they need clarification and guidance. That is all we should be doing here, I think, rather than going into rather basic changes of our present mining laws.

I am perfectly willing to try to marry our two bills, but I fear there is some incompatibility here.

Senator GRUENING. I think we have to try and eliminate the incompatibility and take what is valuable in each.

Thank you very much, Mr. Roth. We appreciate your very excellent statement. Your full statement will be printed at this point.

(The statement referred to follows:)

STATEMENT OF URBAN L. ROTH, ON BEHALF OF THE MINING ASSOCIATION OF MONTANA, THE SOUTHWESTERN MONTANA MINING ASSOCIATION, GEOLOGISTS FOR THE MONTANA BUREAU OF MINES, AND THE MONTANA STATE PLANNING BOARD

#### I. INTRODUCTION

My name is Urban L. Roth, I am a practising lawyer in Butte, Montana. At this hearing I am appearing on behalf of the Mining Association of Montana, the Southwestern Montana Mining Association, Geologists for the Montana Bureau of Mines, the Montana State Planning Board and numerous small miners and prospectors in Montana.

First, I wish to thank this Senate subcommittee for the opportunity to appear and to testify on my views with regard to Senate Bill 3465, introduced on June 9, 1966, by Senators Metcalf and Gruening. This is the second opportunity I have had to express my views in this particular area—the first having been when this subcommittee held hearings in Butte, Montana, over a year ago as a result of the growing unrest and criticism that departmental interpretation of P.L. 167 had inspired.

#### II. PURPOSE OF P.L. 167

I submit that to properly review and examine the proposed legislation, we must review what P.L. 167 was designed to accomplish, what areas it was framed to cover, and whether or not ultimately it accomplished its objectives. Was application and interpretation of the law in line with its purposes—or did administrative decisions violate what was felt to be the bill's objectives?

P.L. 167 was designed to do three things:

1. Give the two chief administrative agencies, under whose authority public lands are administered, an administrative procedural device to quiet title to mining claims used for non-mineral purposes.

2. Give the administrative agencies authority to dispose of the non-mineral (including common variety) resources of the public lands so that full multiple use of public lands could be realized.

3. Remove vast areas of public lands from location under the mining laws which, although mineral, possessed only those qualities common to all common varieties of sand, stone, gravel, pumice, etc.

I believe we can all agree that the law accomplished all three objectives. Armed with this law, the agencies, rightfully, commenced administrative action to test the validity of claims patently being used for non-mining purposes—e.g., tourist courts, bars, restaurants, summer homes, dude ranches, timber and the like.

Moreover, the agencies commenced, so long as such practice did not interfere with legitimate mining activities, to fully utilize all of a particular location's resources, both vegetative and non-vegetative.

And, finally, the agencies entered into lease agreements for the disposal of materials coming within the "common variety" provision of the law.

However, it was in the "common varieties" area that problems began to arise—what did "common variety" mean? For example, did common variety mean a common variety of a particular type of stone, or did it mean a common variety within a narrower classification of stone such as a common variety of limestone, clay, etc. The problems encountered in applying the "common variety" part of the law to specific situations were succinctly set forth in a letter from James K. Carr, then Acting Secretary of the Interior, to the Hon. Wayne N. Aspinall, House of Representatives, dated November 2, 1961, where he said:

"One pertinent question is whether 'common variety' means a common variety of one of the enumerated classes or a common variety of a particular type of mineral within a named class; e.g., does it mean a common variety of stone or does it mean a common variety of a particular type of stone such as limestone or sandstone. Similarly, does the phrase 'distinct and special value' mean a value not commonly found in stone, or does it mean a value not

commonly found in a particular type of stone such as limestone? Furthermore, there is a question as to what factors are to be considered in determining whether a deposit has 'some property giving it a distinct and special value.' A deposit may have distinct and special value because of intrinsic factors such as its physical characteristics and chemical composition or because of extrinsic factors such as local scarcity, geographical location, and demand."

It was over these problems of interpreting the ambiguous "common varieties" section of P.L. 167, and answering the questions raised by Carr that disagreement arose and over which inequities were visited upon *bona fide* miners. Geologists and miners disagreed with bureau interpretations in this area. Decisions flowed out of the Department of Interior in which the following were developed:

1. Rarity, as opposed to widespread occurrence, was not a useful guide.
2. While the product might be more valuable than another in the same generic classification—thus making it *sui generis*, if it was put to the same use as more common minerals were, it was a common variety.
3. If the then market was merely parochial, rather than interstate, it was common.

But are any of the connotations really within the definition of the word "common"? "Common" is defined "Belonging or pertaining to the community at large; public, of ordinary occurrence or appearance, general or prevalent—designating the more familiar type of anything; as, *common salt*." Webster's Collegiate Dictionary, 5th Ed.

It would seem that any of the above tests would be at odds with the Webster definition. A good example of the fallacy in the criteria listed would be to take the material gold and fashion it into building blocks. The use would be the same as common stone. Would this therefore render it unlocatable? The above example forces administrative criteria to their logical extreme and perhaps the example is absurd, but it is often when we push a given test to its extreme that its fallacy is revealed.

### III. AGREEMENT THAT AMENDMENT IS NEEDED

Gain say it that there is unanimity in the view that clarifying legislation is needed. Government Agencies, members of Congress and Industry have gone on record for the need for an Amendment to Section 3 of P.L. 167.

I would like to refer briefly to the following excerpts from the previous subcommittee hearing in June of 1965, later reconvened in September, 1965, when the following comments were made:

Mr. Arthur Greeley, Department of Agriculture:

"I do think there are some problems in connection with administration of the common varieties provision; that some changes would be desirable." (Tr. 102)

Mr. John A. Varver, Jr., Department of Interior:

"Through other similar expressions from Members of Congress, the mining industry, and individuals, and by reason of our own experience in our efforts to administer this law, we have been made aware of the very real difficulty faced by those who must distinguish between a 'common variety' deposit and one which has special distinct properties making it commercially valuable for use in a manufacturing, industrial, or processing operation. We agree that the concept of a 'common variety', not clearly defined by statute, is a difficult one to administer. Our efforts to do so over the past 8 years have led to a multitude of investigations, contests, hearings, decisions, and reviews, as the result of which the question has been considered many times. Consequently, a substantial body of administrative case law has been developed, and the administrative agencies concerned, primarily the Bureau of Land Management and the Forest Service, must rely on these cases in their efforts to make proper determinations in the field."

Mr. Frank J. Barry, Solicitor, Department of Interior:

"Clarifying amendments to the 'common varieties' provision appear essential if the statute is to settle, finally, the rights of the United States, of the public, and of the mining industry."

And finally, Senator Gruening's and Senator Metcalf's request to all of us who attended the June '65' hearings to present amendatory legislation. Implicit in the hearings, was the recognition by all parties governmental and industrial that the present definition of "common varieties" was inadequate and remedial legislation was called for.

Thus at the close of the hearings and after Senator Gruening and his staff had an opportunity to review the testimony and the facts, Senator Gruening

made the following statement in a letter to Secretary of Interior Udall, February 9, 1966:

"In reviewing the hearings held during the last session and the voluminous files of correspondence from miners describing cases of conflict between individual operators and the Executive Branch of the Government, I find numerous suggestions that the difficulties which have been encountered could be solved by amendment of the legislation."

#### IV. S. 3485—THE ANSWER TO A RECOGNIZED PROBLEM

I respectfully submit, on behalf of the groups I represent, that the proposed amendatory legislation introduced by the Honorable Lee Metcalf, Senator from Montana, and the Honorable Ernest Gruening, Senator from Alaska, will cure, to a large extent the many problems which all of us recognize exist.

The first part of the Bill is, with some minor changes, the same as the present Section 3 of P.L. 167. The first change in the present law is provided by the following language: "'Common varieties' as used in this Act shall not include deposits of such materials which have some chemical, physical, or chemical and physical, property or properties (other than lack or presence of physical properties of mere weight, volume, strength), making them valuable mineral deposits under such mining laws."

The above exclusionary sentence can be compared with the following statement:

"I would further say that a 'common variety' of material is one that has no special *physical* or *chemical properties* which differentiate it from other deposits of such material so as to give it a special and distinct value. You will note that I have stressed the chemical or physical properties of the material itself. \* \* \* Certainly under our definition of the terms 'limestone,' 'quartzite,' or other material valuable for metallurgy, limestone suitable for cement making, stone suitable for cutting into blocks or naturally cleavable into slabs suitable for building, or silica sand suitable for glass manufacture, foundry use, for example, would not be a 'common variety.' Such materials would remain subject to location under the mining laws upon a valid discovery and would, as in the past, be subject to patent upon proper application.

Sincerely yours,

L. E. HOFFMAN  
(For the Director)."

See Exhibit C p. 70-71 Of the Hearing.

Thus the first amendatory sentence includes the Department's interpretation of the present law. In addition, it recognizes and thus excludes those usual qualities all stone shares, "namely, weight, volume, and strength." (Statement of Uno M. Sahinen, p. 28 Hearing.)

"Use or usefulness for a common purpose or application shall not classify a material as a common variety," is the next amendatory and clarifying sentence. This rids us of the fallacious criterion set up in Administrative decisions. Use has nothing in common with a mineral's occurrence or, for that matter little to do with its value or inherent characteristics. There are all sorts of materials with which one can build a house—but obviously the qualities of many materials, although used for the same purpose, makes them decisions adopting this test of "use as opposed to 'uncommon' characteristics" must be reversed.

The next sentence in the Bill gives extremely sound examples of those types of materials and their use which are uncommon—thus giving Administrative Agencies the guidelines needed to administer the law. Minerals not named, but analogous in composition or use, to those delimited will be admitted to location. Ambiguity is lost—clarification is gained.

"'Common varieties' as used in this Act shall include, among others, deposits of sand, stone, gravel, pumice, pumicite, and cinders valuable and suitable for use only as fill, or as riprap, road base, or any other purpose where only lack or presence of the physical properties of mere weight, volume, or strength, is required," is again taken from the statement of one of the present Act's critics, Uno Sahinen; (see page 28 of the Hearing Transcript.) This is an accepted geological and scientific basis upon which to differentiate the "common" from the "uncommon" varieties of minerals.

Next, Petrified wood is defined.

As an aid to further interpretation of the Act, the Bill provides that "Terms used in this Act shall be understood and applied in the meaning they have in commerce and the construction and mining industries." Here we have a vast

body of definitive terms, well-settled, well-recognized to assist in further interpretive and constructive problems.

Finally, "Nothing contained in this Act shall be construed as relieving a claimant from any other requirements of the mining laws of the United States." Thus other areas of settled mining law remain undisturbed.

Moreover, the present Bill removes any problem of reconciling 30 U.S.C. 161 with Section 3. As was pointed out by Senator Metcalf (Tr. 118-119), 30 U.S.C. 161 is still law. Mr. Barry agreed insofar as it was not affected by P.L. 167. The problem of statutory construction created by 30 U.S.C. 161 and reconciling it with Section 3 of the present law is obviated by the present amendatory bill. Any ambiguity is removed—both laws can be given application.

#### V. ECONOMIC NEED

Departmental rulings contesting and invalidating mining claims on the basis that the location is of a "common variety" mineral have harrassed legitimate miners, retarded expansion of mining into these areas, and had a devastating effect on small miners attempting to operate in this area. Present leasing laws do not give a solution to a mineral claimant because of uneconomical royalty demands and the knowledge that exploiting a deposit under lease leads to a sophisticated form of claim jumping—competitive bidding after developmental and capital expenditures have revealed a location's value. This system of "using" another's resourcefulness is anathema to the American way of doing things—our entire heritage is aimed at rewarding work—not penalizing it.

Great economical wealth has been uncovered under the "Big Skies" of Montana, Idaho, Colorado, California, Alaska, and other western states because of the Mining Law of 1872. Since 1892 Congress evidenced a desire to put building stone within the scope of those laws. In 1955 Congress evidenced a desire to exclude from "Common varieties" those minerals with uncommon characteristics or of uncommon occurrence. Administrative decisions have, however, negated this policy.

The need for a change is acknowledged by all interested groups. The present proposed bill cures the mispractice and misinterpretation which has grown up in the confusion of the poorly defined "common varieties" section of the present law. I sincerely urge the approval of this bill by this subcommittee and its adoption into law by Congress.

Thank you.

Senator GRUENING. The next witness is Mr. James Henderson, representing the Las Vegas Building Materials Co., and also representing the National Sand & Gravel Association. Mr. Henderson, we are happy to have you here, and we are sorry for the delay.

#### STATEMENT OF J. R. HENDERSON, PRESIDENT, LAS VEGAS BUILDING MATERIALS, INC., LAS VEGAS, NEV.; ACCOMPANIED BY VINCENT B. AHERN, JR., ASSISTANT MANAGING DIRECTOR OF THE NATIONAL SAND & GRAVEL ASSOCIATION

Mr. HENDERSON. Mr. Chairman, I have with me Vincent B. Ahern, Jr., assistant managing director of the National Sand & Gravel Association.

Mr. Chairman, Senator Metcalf, my name is J. R. Henderson. I am president of Las Vegas Building Materials, Inc., Las Vegas, Nev., and I appear before your committee as the representative of the National Sand & Gravel Association, whose board of directors, by appropriate resolution, has authorized and instructed me to speak for the sand and gravel industry in respect to S. 2281 and S. 3485.

I am a member of the board of directors of the association, which in February of this year celebrated its 50th anniversary. Its member companies are found in every part of the United States. The two bills are of much concern to our industry, and the association desires to be heard with respect to their provisions.

I would first like to give the committee an understanding of the great role which the sand and gravel industry plays in the Nation's economy. Our industry, in terms of mine units produced, is the largest member of the mining family. In an address at the 50th annual convention of the association, the Honorable John A. Carver, Jr., Under Secretary of the Interior, stated that the growth of the sand and gravel industry since World War II from 200 million short tons of annual production with a value of about \$120 million, to 870 million tons and nearly \$900 million, respectively, in 1965, has been, in his words, truly phenomenal. He said that when this record is matched against the trend of the gross national product, it is clear that the sand and gravel industry has been a major contributor to the Nation's developing prosperity, "for you have outperformed the general economy by something like a third."

Our association has been in the forefront of the forces which are dedicated to preserving the natural beauty of our country. Through graduate programs at the University of Illinois and in many other ways, the sand and gravel industry has made a substantial contribution to this movement. Edward K. Davison, president of the Davison Sand & Gravel Co. of Pittsburgh, and a member of our board of directors, was invited to appear on the program of the White House Conference on Natural Beauty, a little over 1 year ago. Mr. Carver referred to his contribution to that program. He congratulated the association and our member companies for their sustained contribution to the conservation of the country's land resources by the restoration of worked-out sand and gravel deposits. This restoration provides for a residual use of the land which makes a substantial contribution to the economy and avoids the blight of land ruthlessly destroyed with little care for the national effort inaugurated by the President to recapture our natural beauty.

The Under Secretary put it this way in his talk:

Let me say, here and now, that the work you have done in encouraging your members to follow the excellent example of those who have been most successful in site rehabilitation is entitled to the highest commendation. I take great pleasure in extending that recognition—unstintingly.

At the present rate of sand and gravel production in the United States, and assuming that production does not increase in response to growing demand, our industry will have to produce well over 25 billion tons of sand and gravel in the 30-year period from 1962 to 1992. I use this span of years because the American Society of Planning Officials estimates that in these 30 years, increased demand will mean that we shall actually have to produce 42 billion tons in order to provide the basic facilities for the expected population growth by 1992. By the year 2000, it is expected that our country's population will total 350 million persons. Great construction programs of all classifications will have to be undertaken and carried out.

Every conceivable form of building must be increased if the country is going to provide all of the facilities which a population of these staggering dimensions is going to need for basic accommodations. As a part of its preview of the future, the American Society of Planning Officials said that by 1992 our annual sand and gravel production will have to total more than 2 billion tons.

Our association has made several surveys of land use by the sand and gravel industry, in order to ascertain the extent of existing sand

and gravel reserves. Based on current demands, and not allowing for the expected increase, presently held reserves for sand and gravel production will be exhausted in not more than 20 years, taking the country as a whole. There is an ill-founded assumption that sand and gravel is an inexhaustible natural resource, but what I have already said to you in this statement shows this to be a dangerous assumption.

When it formulated its program for natural resources development, the Fairfax County, Va., Planning Commission warned:

\* \* \* gravel is a natural resource. Although it is commonly found and erroneously regarded as not valuable, it is an important and essential element to our economy and to our every day existence. Gravel is an unrenovable resource that should be used, and should not be lost forever by development on the surface of gravel deposits.

The western Governors, at their conference in May 1964, expressed their concern with the seriousness of the problem presented by the fact that sand and gravel resources and reserves are limited, and made it clear that in their judgment, this was a problem which must be solved if the construction program in the West is to be carried forward at anything like its expected proportions:

Sand and gravel: Whereas the demands of industry and of the public for high-grade construction aggregates are increasing by leaps and bounds in order to meet the expanded highway and other construction programs so necessary to our economic growth and well-being: Now, therefore, be it

*Resolved*, That the Western Governors' Conference urges that Congress amend existing law to permit the application of the general mining laws to deposits of sand and gravel which can be mined, processed, and marketed for use of high-grade construction aggregates.

The sand and gravel industry, then, faces some real problems in the future in obtaining necessary reserve deposits. These problems have been compounded since 1955 by the interpretation of Public Law 167. Public Law 167 sought to exclude, among other minerals, "common varieties" of sand and gravel. The Bureau of Land Management of the Department of the Interior undertook to define the term "common varieties" to include all sand and gravel.

Since that time, the Bureau of Land Management has continually denied sand and gravel claims, and taken the position that they had no choice under the statute but to exclude sand and gravel even though this created a problem of desperate importance in the very States where so much of the land is under Federal ownership. Public Law 167 was intended to prevent the exploitation of public lands by unscrupulous speculators. The National Sand and Gravel Association shares the Bureau's desire to make it impossible for anyone to exploit the public lands.

The exclusion of sand and gravel from patentability of lands in the Federal domain has created a serious economic problem in the Western States. As of 1964, the Federal Government owned 86.9 percent of the land in Nevada, and in Clark County, Nev., 98.94 percent of the land. While this is by far the largest ownership of Federal land in any Western State, other Western States are also finding themselves in serious difficulty in respect to the availability of sand and gravel of suitable quality for use in their construction programs.

For example, Federal ownership of land in Utah is 69.1 percent; in Idaho, 64.8 percent; in Oregon, 51.1 percent; in Wyoming, 48.4 percent; in California, 44.9 percent; in Arizona, 44.7 percent; in Colo-

rado, 36 percent; in New Mexico, 34.9 percent, and in Montana and Washington, over 29 percent.

And, Senator Gruening, I did not quite get Alaska, but I am sure it is in excess of 80 percent.

Senator GRUENING. We exceed all of the other States in the amount of public domain.

Mr. HENDERSON. The country must be aware of the fact that if sand and gravel is to be made available to the public, responsible producers must have access to lands in the public domain in the Western States. Sand and gravel must today not only meet rigid specification requirements, but also must be available at reasonable cost, which means that sand and gravel must be mined reasonably close to the construction market, since transportation is the most important cost element in sand and gravel prices.

The two bills now being considered by this committee, S. 2281 and S. 3485, are designed to define "common varieties," within the meaning of Public Law 167, to the end that the sand and gravel industry will be able to patent mining claims on lands within the Federal domain. The National Sand & Gravel Association supports the principle to which both bills are devoted.

We have given the most careful consideration to this legislation. We believe that S. 3485, introduced by Mr. Metcalf for himself and for Mr. Gruening, of Alaska, if enacted in its present form, would achieve the goal of assuring that the Western States will have an adequate supply of sand and gravel available in the future for monumental construction programs.

While the association prefers the language of S. 3485, we believe that S. 2281 will also provide a solution to the same problem. We do believe, however, that it would be desirable to make certain changes in S. 2281 as it is presently drafted:

1. S. 2281 would add a new section, section 3(a), to Public Law 167. Under subparagraph (a), the owner of any unpatented mining claim will be required to file with the Secretary of the Interior a statement containing information regarding the claimant and documentation of the location and description of the mining claim. Beginning on line 17 of page 3, it is also required that "statements pertaining to claims located prior to the effective date of this subsection shall be filed within 90 days from and after the date of location of the claim." Failure to file the statement within the allotted time will cause the termination of any rights in the claim.

Many sand and gravel producers have claims which are unpatented but which were located several years ago. It will be impossible, therefore, for these claimants to file the statements within 90 days from the date of location of the claim, since this period of time elapsed some time ago.

I believe the intent here is to compel future claimants to file these statements within 90 days of the location of their claim. Deletion of the words "prior to" on line 18, page 3, and substitution of the words "on or after" will eliminate this difficulty and carry out the intent of the provision.

2. Subparagraph (e) on page 5 needs clarification. It appears that the confusion in this subparagraph may be due to a typographical error omitting some part of the sentence.

3. Section 3A (g), on page 6, states that no mining claim may be located on land which "has not been classified by the Secretary of the Interior as proper for such use and disposal." No criteria are established for this classification of land. The Secretary would apparently be enabled to classify land without regard to the availability of minerals therein, and there do not appear to be any limitations on his authority. We believe that the authority granted to the Secretary under this provision is too broad, and that it should either be eliminated from the bill, or alternatively, that criteria for this classification system be specifically enumerated in the bill itself.

4. Section 3A (f) will require the owner of any unpatented claim located after enactment of the section to file a patent within 3 years from the date of location. We do not believe that this requirement presents an onerous burden, but in section 3A (h), it is further provided that the owner must undertake substantial mining operations within 5 years from the date the patent is issued. Thus, a sand and gravel producer has only a total period of 8 years within which he must undertake substantial mining operations.

The problem of maintaining adequate reserve supplies of sand and gravel for future markets is an increasingly difficult task for sand and gravel producers. The 8-year period established under section 3A eliminates the use of these lands as reserve deposits. This problem can be partially solved by allowing a more reasonable time within which the producer must undertake substantial mining operations. We suggest, therefore, that 10 years from the date of patent be allowed before substantial mining operations must be undertaken.

5. Section 3A (h) (2) provides that title to patented claims will revert to the United States if the land is used for any other purpose but mining within 25 years from the date of patent unless all of the mineral deposits have been economically extracted. The National Sand and Gravel Association, through its land rehabilitation research program at the University of Illinois, has been seeking to encourage simultaneous rehabilitation by the sand and gravel industry. Our research has demonstrated that it is more practical, less costly, and in the public interest to commence rehabilitation at the same time that mining operations are commenced. This avoids the scarring of the landscape for the entire period of time during which mining operations are conducted.

Simultaneous rehabilitation, however, would be prohibited by 3A (h) (2) since the land could not be converted to another use after rehabilitation until the entire deposit is exhausted. We believe it is in the public interest, therefore, to provide that any part of the claim can be rehabilitated and converted to another use within the 25-year period provided that the portion of land involved has been exhausted of mineral deposits.

The sand and gravel industry has the right to say, in the light of the evidence, that in war and in peace, it has provided without Federal subsidy, the basic raw material on which all construction programs are launched—sand and gravel. It is recognized by the U.S. Department of the Interior as a progressive, enlightened industry which has constantly sought, by every conceivable means, to improve the quality of its product and to provide the public with an indispensable material at the lowest possible price.

The association's program reflects the industry's awareness of our obligation to the public to conserve the use of land, and to improve our operations by the adoption of performance standards. This program has elicited many commendations and led to the eloquent address by the Under Secretary of the Interior to which I have already referred. If the legislation now before you is enacted with appropriate changes, according to our suggestions, I give you our pledge that public lands will not be exploited by our industry, that they will be used to provide for the public an invaluable but nonetheless exhaustible natural resource, and will permit us to make an even greater contribution to the total economy of the country and to the communities in which our operations will be located.

I would now like to hand to your committee publications of the association which exemplify our industry's concern with the program so widely supported throughout the United States for the conservation of land and for the inauguration of rehabilitation practices which will preserve natural beauty and establish a valuable residual purpose.

Thank you very much, and I will be happy to try to answer any questions.

Senator GRUENING. Thank you very much, Mr. Henderson, for an excellent statement.

Do you think that the sand and gravel industry will be able to meet the requirements in the year 2000?

Mr. HENDERSON. We sincerely trust we will, if we have the right to obtain the sand and gravel.

Senator GRUENING. Your estimate is that we will have 350 million people at that time. Some of the hearings I have been conducting indicate that our population will have doubled by that time, and that it will be 400 million. Have you any thoughts on that subject?

Mr. HENDERSON. I am sorry, sir, I am not an expert in that field.

Senator GRUENING. Senator Metcalf?

Senator METCALF. No questions. Thank you very much.

Senator GRUENING. Thank you very much.

Our next witness is Mr. Thaddeus S. Snell, of Chicago, representing the Gypsum Association. We are happy to have you here, Mr. Snell.

#### STATEMENT OF THADDEUS S. SNELL, ON BEHALF OF THE GYPSUM ASSOCIATION

Mr. SNELL. Thank you, sir. My name is Thaddeus S. Snell, and I am an attorney with offices at 134 South LaSalle Street, Chicago, Ill.

I am appearing today on behalf of the Gypsum Association in support of S. 3485. The 13 members of the Gypsum Association are manufacturers of gypsum building products.

Mr. Chairman, in view of the time, unless you have a suggestion to the contrary, I would be very happy to have my statement reproduced in the record without reading it.

Senator GRUENING. That is very cooperative. We would appreciate it. The statement will be printed in full, and if you would like to summarize it or touch on the highlights, we will be glad to have you do that, also.

Mr. SNELL. Thank you, Mr. Chairman.

I would like to point out we have a suggestion at the end as to one minor amendment to the bill for clarification purposes which I believe is self-explanatory. I simply call that to your attention.

Senator METCALF. Do you think the bill takes care of gypsum as it is written at the present time?

Mr. SNELL. Yes, Senator Metcalf, it does, but I would like to add a few other comments in view of the previous testimony today, if I may.

Senator GRUENING. Please do.

Mr. SNELL. I was involved in this entire common varieties problem from the time it first arose in 1955 when Senator Metcalf, then Congressman Metcalf, was also vitally interested and extremely helpful in trying to straighten up this difficult problem.

We raised the question of what the effect of the proposed legislation on gypsum would be and the very question that Mr. Lonergan mentioned today as to the construction of the word "stone."

We were very much concerned about that. Fortunately, first Members of the House of Representatives, and then Members of the Senate recognized the peculiar characteristics of gypsum and in their report specifically stated that gypsum was not a common variety.

I happen to be of the opinion personally as a lawyer that there was no equivocation in that statement and that it was quite clear. But unfortunately that was not the view of the administrative branch of the Government. And I say this and what I have to say with high regard also for members of the Bureau of Land Management and the Department of the Interior and the Forest Service. They have a different opinion, or some of them have a different opinion from what I understand Congress expressed back in 1955 and has consistently expressed since that time.

My view and my understanding is that Congress said we are not going to change the mining laws as to the mining industry; we are going to continue supporting the mining industry as we have before, but we are going to attempt to avoid and to stop the misuse of the mining laws by nonmining people; that is, misuse of surface rights and so forth, as Senator Cannon suggested earlier today.

This was not a change in the mining laws or the approach to the mining laws and the report specifically so stated.

Now, I think what happened is that those who have a contrary view of the mining laws seized upon this legislation to use it for a different purpose—basically, to change the approach to the mining laws.

Just in view of the earlier comment today, I pulled a file that I have which includes in it a copy, I understand it is a copy, of a letter written by the Solicitor's Office of the Department of the Interior to the Director of the Bureau of Land Management and was released back in July of 1961. It deals with the question of limestone used in the manufacture of portland cement, which was one of the items specifically excluded from the definition of common varieties in the bill.

The letter quotes a section of the report of the Senate, that is Senate Report No. 554 of the 84th Congress, to the effect—"Deposits located under the mining laws were excluded if the deposits were commercially valuable because of distinct and special properties"—and this is underlined—"such as, for example, limestone suitable for use in the production of cement"—end of underlining—"metallurgical or chemical grade limestone, gypsum, and the like."

The letter goes on to state that the legislative history, and I am quoting—

of an act of Congress cannot be drawn upon to establish a meaning or intent which is contrary to the clear language of the statute. It is our opinion, therefore, that the above underlined portion of the Senate Report No. 554, supra, must necessarily be disregarded in considering the question you have posed.

In other words, it was the position of the Solicitor's Office of the Department of the Interior that the committee report, the purpose of which was to clarify the meaning of common varieties, should be disregarded in interpreting the law and that the bare bones of the language itself should be used from which they concluded that large segments of minerals should be excluded from the concept of the mining laws and should no longer be locatable and subject to the obtaining of patents.

Senator METCALF. I believe Mr. Cavanaugh has revised that part of his opinion.

Mr. SNELL. I think Mr. Cavanaugh is entitled to his opinion, and I say this with high regard for his legal ability. I think that there is a basic difference of opinion, and I think that it is important that the Congress recognize this and call a spade a spade. If it is the desire of Congress to revise the mining laws, then certainly it is the prerogative of Congress, but it should be done in a straightforward, forthright manner, and I understand this whole question is now under study. But the common varieties question is a separate question. This was not intended as a major revision of the mining laws, but was intended to take care of a different problem, and I think that this is the objective that should be pursued.

Now, it concerns me that in Mr. Cavanaugh's statement today he says that since July 23, 1955, there has been great dispute as to just what is a distinct and special value, and recognizes the problems they have had. He proposes an amendment which would eliminate the common varieties concept and would provide that there will be no locations made in the future for any deposit of sand, stone, gravel, pumice, pumicite, clay, cinders, or petrified wood.

Now, the word included there that bothers me is the word "stone," and I just happen to have a little sheet of paper that I prepared, I think, back in 1955 on this question, and if you will permit me to be 11 years old, Mr. Chairman, Webster at that time was defining stone as in part "concreted earthy or mineral matter, rock, or rocklike matter as a material, especially for building," in an old case in 13 Federal 525 and it said "stone is early or mineral matter condensed in a hard state."

As a lawyer, Mr. Chairman, I must suggest that that definition is extremely broad, it is not even limited to nonmetallic minerals, and if stone is rock and rock is mineral, and we exclude stone from the mining laws, I suggest that we have repealed the Mining Act of 1872.

This is of serious concern to the gypsum industry because we feel that we are making a substantial contribution as a result of the mining laws to the economy of the Western States particularly. We are mining in 8 of the 11 Western States, refining in 9 of the 11, and the future application of the mining laws to our industry is essential to the continuation and prosperity of that industry.

I must also comment on the statement of Mr. Greeley. I must respectfully disagree with the suggestions contained therein for

changes of the leasing concept in this law. The idea that building materials should not be treated as valuable minerals subject to the mining laws is wholly inconsistent with the history of the building industry and the contribution it has made and the high regard, I believe, it has had for the basic philosophy underlying this law.

I know of no instance in which the gypsum deposits have been misused where surface rights have been obtained through a claim of a gypsum deposit.

I did not come fully prepared to comment on S. 2281, and I was very happy because of that to hear Senator Cannon's remarks earlier S. 2281 the gypsum and limestone industries. In view of those remarks, I think it is unnecessary that I comment on the general provisions of that bill, except to say that the proposed new section 3A in S. 2281 does propose a rather comprehensive amendment to the mining laws and it would be our position that this whole concept should be treated separate from the concept involved in the common varieties legislation.

Senator GRUENING. Thank you very much, Mr. Snell.

Senator Metcalf, do you have any questions?

Senator METCALF. No; your statement has been very helpful.

Senator GRUENING. Your full statement, as previously stated, will be printed at this point.

(The statement referred to follows:)

#### STATEMENT OF THADDEUS S. SNELL ON BEHALF OF THE GYPSUM ASSOCIATION

Mr. Chairman, my name is Thaddeus S. Snell; I am an attorney with offices at 134 South LaSalle Street, Chicago, Illinois. I am appearing today on behalf of the Gypsum Association in support of S. 3485. The 13 members of the Gypsum Association are manufacturers of gypsum building products.

The principal products of the industry include wall plaster and various gypsum board products, such as lath over which plaster is applied, gypsum wallboard and gypsum sheathing. Roof decks on fireproof buildings are also made of gypsum in many cases and one of the principle uses of gypsum today is for fireproofing the beams and columns in structural steel buildings. Gypsum is one of the truly fireproof materials.

Gypsum is a nonmetallic mineral. Its chemical formula is  $\text{CaSO}_4 \cdot 2\text{H}_2\text{O}$ . There are two molecules of water of crystallization combined with each molecule of calcium sulphate. The peculiar characteristic of gypsum is that when the gypsum is heated, the water of crystallization is driven off as steam. The product thus produced is plaster of Paris and when water is added it will recombine with the gypsum triggering a reformation of the original crystals. The crystals then harden with a result comparable to the original rock. This makes it possible to use the plaster of Paris for plastering or to make it into the various board products by fabricating at the mill.

Members of the Gypsum Association have their own sources of raw materials which are usually located adjacent to or relatively near the manufacturing plants. Because of the low value of gypsum as a raw material, it is uneconomical to transport it any great distance. The finished products are also relatively low in value compared with their weight and it is also relatively uneconomical to transport the finished products great distances. For these reasons and other normal competitive factors, there is a constant search for new sources of gypsum, strategically located either with relation to existing producing points or major markets. Gypsum deposits presently are being worked in 8 of the 11 Western States. The demand for gypsum wallboard, plaster and other gypsum products in this Western area is supplied entirely from more than 20 plants which are located in 9 of these 11 states. Another major use of gypsum is as an ingredient in the manufacture of Portland Cement. Many of the members of the Gypsum Association sell gypsum to cement companies. There are also a number of companies who specialize in mining or quarrying gypsum solely for sale to the cement companies. These latter companies are not members of the Gypsum Association because the Association is primarily concerned with products manufactured out

of gypsum as distinguished from products where gypsum is only one of several ingredients used in the manufacturing process.

Historically, claims to gypsum deposits on public lands have been located and patented under the Mining Laws of the United States. To the best of my knowledge, and my investigation dates back to the early days of the industry, gypsum deposits are not the cause of any serious problems incident to the application of the Mining Laws. Gypsum is a relatively soft mineral. It is not used for road building purposes; it is of no value for building blocks. In fact, its principle use depends upon the peculiar characteristics which I have described. Claims to gypsum deposits are filed only because gypsum is desired for use as gypsum in one of the various uses which I have previously mentioned. I know of no instances, and have heard of no occasion, when gypsum has been the basis for acquisition of title to land so that that land may be used for some other purpose. Those who have filed claims and applications for patents have proceeded to obtain the patents with a minimum of difficulty. In recent years, however, this situation has changed.

In 1955 when the "common varieties" concept was introduced into Mining Law legislation, the gypsum industry, of course, was curious as to its application and effects upon the gypsum industry. Appropriate inquiries were made of the committees dealing with the Bills. We learned that the Congress was concerned with a growing number of abuses of the Mining Laws whereby persons were acquiring claims and ultimately title to property in the public domain although their primary interest was not in mining the minerals on these lands. At the same time we were assured that the legislation would faithfully safeguard all of the rights and interests of bona fide prospectors and mine operators. As to gypsum, which the Congress recognized as an unusual, uncommon mineral in itself, we were further assured that any legitimate claim to a gypsum deposit could be located and patented under the Mining Laws. For good and valid reasons best understood by members of the committee, we were told, however, this could best be accomplished by the vehicle of the committee report rather than by clarifying language in the legislation itself.

These assurances were faithfully carried out by the Congress. Both Senate report No. 554 accompanying S. 1713 and report No. 730 of the House of Representatives accompanying H.R. 5891 in the 84th Congress First Session had language specifically indicating that gypsum was not to be considered as a common variety of mineral and was to remain under the Mining Laws rather than subject to disposition pursuant to the Materials Act of 1947. On the basis of this background and with this Congressional history behind the amendments to the Mining Act which were adopted in 1955, the Gypsum Association members continued to locate and patent claims to gypsum deposits, as theretofore, until 1961. In that year, representatives of the gypsum industry were advised by the Bureau of Land Management of the Department of Interior, that they were in the process of writing new regulations under which claims to gypsum deposits could no longer be located and patented under the Mining Laws unless the gypsum deposit had some distinct and special property not generally found in other gypsum deposits. Since the gypsum in one deposit differs in no way from the gypsum in another deposit, the effect of this proposal was to slam the door on the gypsum industry. Future development and use of gypsum deposits on public lands would be impossible. The multi-million dollar investment required of a gypsum plant could not be justified if the raw material supply was dependent upon short term leases, nor could a company justify its exploration expenses if the anticipated end result could not be a claim subject to patenting under the Mining Laws.

The gypsum industry commented on the published proposed regulations and extensive discussions were held over a period of several months with representatives of the Bureau of Land Management. It was apparent that within the Bureau there was substantial difference of opinion as to the Congressional intent behind the law.

Suffice it to say that on September 14, 1962, the controversy at least as to gypsum was resolved by publication of regulations which flatly stated that "gypsum" was not a "common variety." (43 CFR Sec. 3511.1).

Again the gypsum industry believed the matter was settled, and as far as I know, the Bureau of Land Management since 1962 has raised no objection based on the "common varieties" concept to applications for patents on claims to gypsum deposits. Not so the Forest Service, however. In at least one case recently, the same arguments raised in 1961 and 1962 by the Bureau of Land

Management have been raised by the Forest Service. This uncertainty still exists as to the validity of claims filed since the "common varieties" amendment of 1955. Potential damages for working invalid claims are substantial. It seems that this controversy will not be resolved until Congress itself asserts as a matter of law that which to us seemed abundantly clear from the history of the "common varieties" legislation—namely, that "gypsum" is not a "common variety", but that claims to gypsum deposits are subject to location and patenting under the mining laws as they historically have been.

We believe that S. 3485 accomplishes this objective and we support the Bill. We suggest, however, that on page 2, line 13, the word "or" be inserted before the word "gypsum" to make it clear that the phrase "metallurgical or chemical grade" in line 12 preceding the word "limestones" does not also modify "gypsum." The phrase "metallurgical or chemical grade" is not used and has no significance in the gypsum industry. Unless this change is made we fear the ingenuity evident in the past may again appear to suggest that the only gypsum which is not a "common variety" is a deposit of a non-existent "metallurgical or chemical grade" which has characteristics not found in other gypsum deposits.

On behalf of the Gypsum Association and its members I thank you, Mr. Chairman, for the opportunity of expressing our views.

Senator GRUENING. Our next witness is Dr. Donald K. Shields, of Brea, Calif.

Dr. Shields, we are very happy to have you here.

#### STATEMENT OF DR. DONALD K. SHIELDS, BREA, CALIF.

Dr. SHIELDS. Thank you. My name is Donald K. Shields, Brea, Calif.

Senator GRUENING. You are an M.D.?

Dr. SHIELDS. Yes, sir.

Senator GRUENING. What is your interest in this legislation?

Dr. SHIELDS. Mining claims that are concerned with common varieties. Before I entered these Chambers, I had no concept of the honor and the education that was to be mine to be able to appear before this committee. I prepared a rather brief, simple outline of a statement that set forth my statement. My problems have been much better stated by Senators Cannon, Metcalf, and a number of other people, so I would rather not go over material that has already been much better presented.

I would like to state briefly some things that have occurred to me in my education that I received today.

In the gentlemen who are here conducting these hearings, I see men who are trying their utmost to represent the will of their constituents, men that to me represent the principles that made this country great. There are others here who are citizens representing their own interests, such as myself.

Opposed to them, I see well-meaning public servants who seem to be more devoted to the interests of bureaucracy and social theory than to the legal rights of the citizens of this land.

The Bureau of Land Management and the Forest Service do recognize that common varieties at times have properties that give them distinct and special value. My reason for this or the proof that I would submit for this is that they charge varying lease prices for common rock that is used for decorative purposes varying from a few cents to many dollars.

This to me indicates that they recognize that there are some distinct and special properties in certain types of common rock.

It does not seem to me, however, that common varieties is the most basic issue here. The usage of land acquired under mining locations law appears to me to be the basic issue.

And I would simply sum up what I would feel the solution to this would be: To have broad and liberal definitions of locatable minerals, be they common mineral or common material, the common varieties I believe we referred to them as. This would include all of the minerals used in industry, construction, and including decorative purposes, including all other previously mentioned usages, too. And to insure the proper usage of mining land, I would suggest that effective measures to insure the devotion of lands acquired by mining claim or patent under mining location laws be enacted to insure their devotion to mineral production.

I see two or three dangers in interpretation of some of the terms in the previously mentioned bills, but in general I think that they encompass what is needed to solve this particular problem.

That is all I would like to say about it.

Senator GRUENING. Thank you very much, Dr. Shields.

Dr. SHIELDS. I might say my problems are very small. I came here with strictly a selfish interest, but my scope has been rather broadened—

Senator GRUENING. Do you own some deposits?

Dr. SHIELDS. I have 10 mining claims of white marble which in my judgment possess distinct and special properties, I have been fighting for about 4 years over these claims; no legal action has been instituted at this time, however. The action has been strictly sparring with the Bureau of Land Management.

Senator GRUENING. Well, one of the functions of Congress is to hear the complaints of our citizens and see whether we can give them relief if the complaints seem to be legitimate.

Senator METCALF, do you have anything to add?

Senator METCALF. In your outline that you have filed, Dr. Shields, you are talking about Senate bill 2281 and H.R. 9982?

Dr. SHIELDS. Right.

Senator METCALF. What about the bill that Senator Gruening and I have introduced, S. 3485?

Dr. SHIELDS. I was unaware of that bill until I arrived today. Although I have not analyzed its provisions completely what was presented to me seems very valid. The bill seems to answer many of the problems.

Senator METCALF. That is all, Mr. Chairman. Thank you very much, Dr. Shields.

Dr. SHIELDS. Thank you very much.

Senator GRUENING. Thank you, Dr. Shields.

Our next witness is Mr. William Kessler, of the Arizona Gypsum Corp.

#### STATEMENT OF WILLIAM KESSLER, ARIZONA GYPSUM CORP.

Mr. KESSLER. Mr. Chairman, my name is Bill Kessler, William Kessler, and I do not have a prepared statement. I learned of this hearing on Sunday and flew in yesterday, but I did make some notes on the plane coming in and I would like to speak spontaneously on it.

Senator GRUENING. Go right ahead.

Mr. KESSLER. I am the general manager and secretary-treasurer of the Arizona Gypsum Corp. We are an Arizona corporation, operating only in Arizona. We operate two open pit gypsum mines there. One of the mines was located in 1945, and it was taken to patent in 1953. We have been operating the deposit consistently and continually at a small profit ever since then.

The material from that deposit is used to supply a cement company near Tucson, Ariz. I am, I think, a living horrible example of what you have spoken about here today, because our other deposit of gypsum located north of Phoenix about 100 miles we acquired in 1961 and we immediately applied for patent on that deposit of gypsum and it is now going into its sixth year of indecision and it was my hope that upon my trip to Washington at this time, I could meet with some representative of the Forest Service and the Department of the Interior and try to finally resolve this problem.

It seems to me to be unnecessary to have additional legislation in order to solve the common-varieties problems with respect to gypsum, but if that is what it takes, if we need to do more than just spell it out, if we need to draw pictures then I heartily endorse Senate bill 3485, which I believe does this.

I might say there has been many unkind words or criticisms of the Department of the Interior Bureau of Land Management here today, but I would like to say that we have been given much cooperation in our patent application, and we have also been given much written support of our position that gypsum is not a common variety of mineral.

It has been spoken of many times in the congressional reports that accompany Public Law 167. There have been many pamphlets, regulations and publications published by the Department of the Interior and almost without exception, they have clearly stated that gypsum is a locatable mineral, and, in fact, I have a letter which is dated June 26, 1964, and it was addressed to Mr. Edward Cliff, Chief of the Forest Service, Department of Agriculture, in Washington, and it is signed by Mr. Charles Stoddard, Director of the Bureau of Land Management, and I will quote two paragraphs as an excerpt from that letter.

Mr. Snell, being the witness who just appeared before you, was a representative of the Gypsum Association. We are not a member of the association, but the reference in this letter is to Mr. Snell of the Gypsum Association:

Mr. Snell was advised that it was the position of the Department of the Interior and of this Bureau that gypsum was a locatable mineral and that a common varieties charge in a complaint is tantamount to a charge by the United States that the material claimed is not gypsum or is not primarily valuable for its incidental gypsum content. However, the patent application—

Referring to Arizona Gypsum's patent application—

the engineer's field report and the contestee's answer all describe gypsum deposits as the basis for the claims.

Now, upon receiving a copy of this letter, I was highly elated and I thought finally after 4 years that we had the problem solved and that the Forest Service would capitulate so to speak.

However, such was not the case. I would not imagine then how any further stumbling blocks could be thrown in our path or how one could then say gypsum was not gypsum; but I now read a memorandum dated December 15, 1965, which says just that, and I will quote

it. This is a memorandum from Mr. Smith, Assistant Regional Forester to Mr. Richard L. Fowler, attorney in charge. Mr. Fowler is attorney for the U.S. Department of Agriculture at Albuquerque. I will read two paragraphs as an excerpt from the memorandum:

In our opinion, the claims are chiefly valuable for the gypsum which occurs for the most part as salenite crystals in siltstone and clay stone, therefore, we cannot say that the material claimed is not a gypsum or that the claims are not primarily valuable for the gypsum contained therein.

I will come to his conclusion after he has said it is gypsum:

The gypsum occurring on the subject claims must be concentrated, this concentrate is now being used for only one purpose, namely, as a retarder in portland cement. This does not require a highly pure gypsum and the product contains impurities of clay stone and siltstone. Accordingly, the product produced is not gypsum in the true sense of the word, but it is principally valuable for the gypsum contained therein.

This is my only copy, but I would be glad to submit a copy to the committee and if they can read anything but doubletalk into that memorandum, then I would appreciate—

Senator GRUENING. We would like to have the whole record. It will be included in the record. The record will be kept open for any reply that the Forest Service considers appropriate.

Mr. KESSLER. I might complete this comment by saying that the attorney at Albuquerque received this memorandum and also the letter from the Department of the Interior, and for some unknown reason he was unable to decide then that gypsum was gypsum and grant us our patent on this property.

I think perhaps the reason he did so was because we were advised by the local mining engineer who investigated our property for the Forest Service and also by his chief at Albuquerque that the claims had originally been recommended for patent.

We were then advised that we were to be used as a guinea pig, as a test case, to determine whether or not the gypsum could be construed as a common variety, and for that reason I was glad to hear the Senator from Colorado's comments about who pays the attorney's bills for appearances before the Bureau of Land Management.

Senator GRUENING. In what form did this advice come that you were going to be used as a guinea pig?

Mr. KESSLER. I had a telephone conversation with the chief mining engineer at Albuquerque.

Senator GRUENING. What is his name?

Mr. KESSLER. Mr. Trajtit. I also was advised that it was originally recommended by Mr. Trajtit. However, that was not to me personally. It was to our geologist. But I would like to just close by saying that, while we feel the law clearly has specified that gypsum is a locatable mineral, while we feel the regulations have been clear in that respect, if it must be left to the discretion of an ill-advised or perhaps an ill-informed or an innocently wrong attorney at Albuquerque, that if he is given such discretion then I believe we should clarify the law, and that is the reason that I support this change.

I am sure you do not wish to handicap any enterprising, ambitious, basic producer, basic prospector-businessman, and I am sure that you realize that the materials that we are dealing with, gypsum and these

other nonmetallics, are the very foundation of the house we live in and the building we are standing in now, and to handicap the individual entrepreneur such as myself leaves us at the mercy of these ill-advised personnel. So I would heartily solicit the recommendation of this subcommittee that Senate bill 3485 be passed.

Senator GRUENING. Senator Metcalf?

Senator METCALF. I have no questions.

Senator GRUENING. Mr. Greeley, I think this is an important point. If we can have a decision that gypsum is not gypsum, where does that leave the industry in any respect if it can be decided that a locatable mineral is not what it is said to be? What guarantee and what sure test do the mining people have? This is an extraordinary decision as presented by this witness.

Mr. GREELEY. This, I must confess, leaves me gasping.

Mr. KESSLER. I would hope that I could make an appointment with you before I leave Washington and perhaps we could get to where the trouble is here.

Mr. GREELEY. How is a quarter to two today?

Mr. KESSLER. That is fine.

Senator GRUENING. I think this spirit of cooperation is a very happy concluding note for this hearing.

Mr. Kessler, the letter and memorandum you mentioned will be printed at this point.

(The data referred to follow :)

JUNE 26, 1964.

MR. EDWARD P. CLIFF,  
Chief, Forest Service,  
Department of Agriculture,  
Washington, D.C.

DEAR MR. CLIFF: The Arizona Gypsum Corporation has filed its Mineral Patent Application No. AR 030559 for patent to 10 placer mining claims located in the Coconino National Forest. Following the rendition of your mineral examiner's report and upon the recommendation of the Regional Forester, we initiated Contest No. Arizona 10586, charging that the mineral material found within the limits of the claims is not a valuable mineral deposit under Section 3 of the Act of July 23, 1955 (69 Stat. 367; 30 U.S.C. 601). The complaint also charged the absence of a discovery and that the land was non-mineral in character.

On June 19, at the request of Senator Bible, Associate Director Harold R. Hochmuth met with Mr. Thaddius Snell, a representative of the national association of gypsum companies. Although the contestee, Arizona Gypsum Corporation is not a member of the association, the association had concerned itself because of the apparent charge that gypsum was a common variety mineral material within the meaning of Public Law 84-167, and, therefore, was not locatable.

Mr. Snell was advised that it was the position of the Department of the Interior and of this Bureau that gypsum was a locatable mineral, and that a "common varieties" charge in a complaint is tantamount to a charge by the United States that the material claimed is not gypsum or is not primarily valuable for its incidental gypsum content.

However, the patent application, the engineer's field report and the contestee's answer all describe gypsum deposits as the basis for the claims. Accordingly, we would appreciate your further consideration of the appropriateness of the charges in the light of 43 CFR 3511.1(b) (formerly 43 CFR 185.121(b)).

Your recommendations may be made directly to the Arizona State Director in Phoenix. If we can supply further information or assistance we will be pleased to do so.

Sincerely yours,

CHARLES H. STODDARD, *Director.*

DEPARTMENT OF AGRICULTURE, FOREST SERVICE, REGION 3, ALBUQUERQUE,  
N. MEX.

## MEMORANDUM

To: Richard L. Fowler, Attorney in Charge.  
From: Zane C. Smith, Assistant Regional Forester.  
Subject: Mining claims, Coconino, Arizona Gypsum Corp., Arizona Contest No. 10568.

Reference is made to your letter of December 8, 1965, with enclosures concerning the subject mineral application and contest wherein you request certain additional information.

In our opinion, the claims are chiefly valuable for the gypsum which occurs for the most part as salenite crystals in siltstone and claystone. Therefore, we cannot say that the material claimed is not a gypsum or that the claims are not primarily valuable for the gypsum contained therein.

As you know, gypsum is used both uncalcined and calcined. Uncalcined, its chief uses are as a retarder in portland cement, as a pigment base for cold water paints, and as a filler for paper and cloth. Calcined gypsum is called "plaster of Paris." Its chief uses are in wall plasters, wall and plaster boards, gypsum blocks and tile, and surgical casts.

The principal use of the gypsum on the subject claims is as a retarder in cement. The impurities contained therein make it unfit for calcining and other uncalcined uses.

Gypsum for all purposes except as a retarder in portland cement should have a high purity and all gypsum deposits with which we are familiar are massive or crystalline deposits with very minor amounts of impurities.

The gypsum occurring on the subject claims must be concentrated. This concentrate is now being used for only one purpose, viz, as a retarder in portland cement. This use does not require a high purity gypsum and the product contains impurities of claystone and siltstone. Accordingly, the product produced is not gypsum in the true sense of the word, but it is chiefly valuable for the gypsum contained therein.

If you desire further information, please advise.

D. W. CUTTER.

Senator GRUENING. I have a letter from the National Wildlife Federation for inclusion at this point. I will also include my answer to the letter.

NATIONAL WILDLIFE FEDERATION,  
Washington, D.C., June 28, 1966.

HON. ERNEST GRUENING,  
*Chairman, Subcommittee on Minerals, Materials, and Fuels,  
Senate Committee on Interior and Insular Affairs,  
New Senate Office Building, Washington, D.C.*

DEAR SENATOR: The National Wildlife Federation is interested and concerned about S. 2281 and S. 3485, which would amend legislation known as the Common Varieties Act, the Materials Act, and the Multiple Purpose Act. We would appreciate having this letter made a part of the current hearings on these proposals.

By way of identification, the National Wildlife Federation is composed of independent affiliates in 49 states. These affiliates, in turn, are composed of local groups and individuals who, when combined with associate members and other supporters of the National Wildlife Federation, number an estimated 2,000,000 persons. We seek to attain conservation goals through educational means.

Attached is a copy of Resolution No. 7, adopted by the National Wildlife Federation in annual convention earlier this year. This resolution was addressed to the Public Law Review Commission to express our organization's conviction that the Commission should make decisions which stress overall public interests, including those recreational values of an aesthetic and social nature, as well as direct economic benefits for private commercial interests.

Principle No. 12, of this resolution relates directly to S. 2281 and S. 3485 and reads as follows:

"Any mining law which allows land in Federal ownership to go to patent should be repealed, with the extraction of minerals being accomplished under

provisions of the Mineral Leasing Act. Leasing arrangements, however, should provide for security of tenure and exclusive use of the amounts of surface land necessary to justify investments. When mining ceases, surfaces must be restored, when practicable, to original conditions with surface rights retained in public ownership."

We fear that S. 2281 and S. 3485 would not be in accord with this principle of mineral leasing, and of the repeal of statutes allowing mineral lands to be patented. In fact, we fear that the effect of these proposals would be the opposite. Under the bills, low-grade, generally low-value materials once again would be locatable under the mining laws. The bill thus would nullify the advances in sound public lands administration brought about by enactment of the Multiple Use Mining Act. Much of the low-grade materials which the bills would resubject to mining laws are found extensively throughout the public land areas. As we view it, vast acreages of Federal reservations and public domain lands could be reopened to entry. At the same time, Federal land agencies would lose effective control over the valuable surface resources within the areas they administer.

In short, we fear that these proposals would set an undesirable precedent in the establishment of public land policy. It is probable that pressures will build for opening up more public land areas for exploitation of mineral resources as demands for other mineral substances grow or as new uses are discovered for the presently low-grade materials.

We urge that the Subcommittee, as well as the Public Land Law Review Commission, consider our proposed principle of expanding coverage of the mineral leasing concept, applying it to all extraction of minerals. In our opinion, this is the best way to realize the benefits of private development of important sub-surface resources while, at the same time, permitting wise control of the surface resources by the Federal Government. We believe the public would be best served in this manner.

Thank you for the invitation and opportunity of making these remarks.

Sincerely,

LOUIS S. CLAPPER,  
*Chief, Division of Conservation Education.*

#### RESOLUTION NO. 7—PUBLIC LAND LAWS

Whereas, the Public Land Law Review Commission has begun its work of reviewing laws and regulations relating to public lands; and

Whereas, the Commission is expected to recommend modernization of many laws and administrative regulations and policies; and

Whereas, the entire nation has a tremendous stake in final recommendations contained in work of this body: Now, therefore, be it

*Resolved*, That the National Wildlife Federation, in annual convention assembled March 12, 1966, at Pittsburgh, Pa., hereby expresses its conviction that the Public Land Law Review Commission should make decisions which stress overall public interests, including those recreational values of an aesthetic and social nature, as well as direct economic benefits for private commercial interests; and be it further

*Resolved*, That adoption of the following principles relating to public domain and Oregon and California revested lands would be in the best interest:

1. All lands should be classified for future use, with only those actually needed for residential, commercial, or industrial purposes being sold or transferred to State or local governmental agencies. It is viewed as essential that detailed and specific criteria be established to prevent land speculators and State and local government entities from acquiring large or key tracts of Federal land. Land transfer agreements should contain strong reverter provisions if lands transferred for public purposes are used for private gain.

2. The bulk of public domain and Oregon and California revested lands should be retained in Federal ownership under direction of a single agency. Boundaries of these properties should be established and identified in a manner readily recognized by the public. The Federal ownership should be consolidated, with in-holding eliminated by exchange or purchase.

3. Lands to be retained in permanent Federal ownership should be managed under sound principles of multiple use duly authorized by law.

4. The Taylor Grazing Act either must be repealed or amended to provide for the permanent possession and multiple use management of public lands, in-

cluding activities for recreational purposes. Grazing advisory boards should be eliminated and the executive agency administering the land authorized to appoint multiple use advisory boards.

5. Grazing fees on public lands should be based on the prevailing rate for rental of private lands in the same areas concerned and the funds derived therefrom used for proper resource management and payment for capital improvements placed upon the land.

6. The Homestead Act is obsolete and meaningless, and should be repealed.

7. The Desert Entry Act is obsolete and meaningless, and should be repealed.

8. Suitable authority and funds must be provided for the development of wildlife habitat in cooperation with State wildlife agencies.

9. Specific authority and funds must allow for the development of all phases of outdoor recreational potentials on public lands and the proper access to them.

10. A national policy on oil shale should direct that the Federal Government continue in oil shale technology and research, with all exploitation of minerals located on public lands being accomplished under leasing arrangements allowing control of the surface resources to remain with the Federal Government.

11. The allowable cut of timber must be based on a conservative estimate of sustained yield.

12. Any mining law which allows land in Federal ownership to go to patent should be repealed, with the extraction of minerals being accomplished under provisions of the Minerals Leasing Act. Leasing arrangements, however, should provide for security of tenure and exclusive use of the amounts of surface land necessary to justify investments. When mining ceases surface must be restored, where practicable, to original condition with surface rights retained in public ownership.

13. Public land exchange and purchase laws should be updated and modernized to permit consolidation of land into manageable blocks and to use cash to equalize differences of value in land exchanges.

14. Re-allocate 50 per cent of the revenues now going into the Reclamation Fund for watershed management, soil conservation, recreation and wildlife habitat development on public lands.

15. Substantial increases in management and development funds for the Bureau of Land Management is recommended. Manpower needs to the level of one land manager for every 25,000 acres of land should be met as a minimum for effective land management in the public interest.

U.S. SENATE,  
Washington, D.C., July 5, 1966.

Mr. LOUIS S. CLAPPER,  
Chief, Division of Conservation Education,  
National Wildlife Federation,  
Washington, D.C.

DEAR MR. CLAPPER: On behalf of the Subcommittee on Minerals, Materials, and fuels, I wish to acknowledge your letter of June 28 expressing the National Wildlife Federation's opposition to S. 2281 and S. 3485, bills to amend the Common Varieties Act. Also, notice is taken of the Federation's Principle No. 12 which would substitute a Federal leasing act for the historic mining laws which have had such an important role in the formation of our Nation as it is today.

As a conservationist of unassailable standing, as I believe my long record in public life shows, I wish to express sharp disagreement with the Federation's position on this proposed legislation and on the mining laws in general. Neither S. 2281 nor S. 3485 would result in misuse of publicly-owned lands of the United States, nor would either interfere with the freedom, propagation and development of wildlife. Rather, the basic purpose of these bills is to cause Public Law 167, 84th Congress, the Common Varieties Act, to be interpreted and administered in accordance with the clear intent of Congress.

I cannot but regard with dismay the growing tendency on the part of certain extremist groups among conservationists to disregard human and social values in their rigid adherence to a doctrinaire line. For specific examples of inequity and hardship in the administration of the Common Varieties Act, I urge you to read the record of our hearings held last year in Butte, as well as those in

Washington this year. For convenient reference, I enclose a copy of the Butte record, and will see to it that you receive this year's hearing as soon as it is available.

As to the Federation's position urging repeal of the mining laws in favor of a general Federal mineral leasing program, the result of such action would be that the vast mineral resources of the public domain would be under the control, in fact, of a favored, rich few. The independent prospector and miner, whose initiative, fortitude, and industry have made such great contributions to the development of Alaska and the other States of the West would be squeezed out by the large companies with their resources enabling them to outbid and outwait the independent.

Again, I cite our hearings and urge the Federation to study them and give consideration to the human and social results of its position.

However, as you request, your letter will be made a part of the record of our hearing, together with a copy of this reply.

Sincerely yours,

ERNEST GRUENING,  
*Chairman, Minerals Subcommittee.*

Senator GRUENING. I have a letter from Mr. E. D. Smith, which was sent to Senator Cannon, which will be included in the record at this point.

(The letter referred to follows:)

U.S. BORAX,  
*December 21, 1965.*

HON. HOWARD W. CANNON,  
*Las Vegas, Nev.*

DEAR SENATOR CANNON: The November 5, 1965 American Mining Congress Legislative Bulletin contained a summary of Senate Bill 2281 which I read with some concern. We have enclosed a copy of the bulletin so that you may see the text of the summary and understand our interpretation of it.

Our concern is over that part of the summary which states:

"The owner of any unpatented claim located after the effective date of the Act would be required to file with the Secretary of the Interior an application for patent within three years from date of location.

"Would provide that 'title to lands patented after this action, based upon mining claims hereafter located, shall revert to the United States if: (1) within five years of the date of patent the owner has not, by substantial mining operations, demonstrated to the satisfaction of the Secretary a devotion of the land to the production of mineral materials, or (2) within 25 years from the date of patent and prior to the removal of all of the mineral material which may be economically extracted, the lands are devoted, without the prior consent of the Secretary, to any use other than mining or processing operations and uses reasonably incident thereto.'

"Would provide that patent for any affected mining claim located after the effective date of the Act shall be issued only after payment to the secretary by the claimant of the fair market value of the surface estate."

We interpret the first three paragraphs of the summary to apply to specific types of deposits and the remaining three paragraphs, given above, refer to any mining claim located after the effective date of the Act. If our interpretation is correct, we beg your consideration of the following points:

1. It does not seem fair that a claimant of a mining claim be required to pay the fair market value of the surface estate unless he acquires fee title to the surface estate. The Bill proposes to charge the patentee for the surface estate at fair market value while giving him something less than fee title. If the patentee defaults in his demonstration of a devotion to the land to mineral production or devotes the land to a use other than mining, processing, and/or uses reasonably incident thereto, the title to the lands reverts to the United States. In our opinion a sale of the surface estate at fair market value subject to the conditions set forth in the Bill is not equitable unless the determination of the fair market value of the lands being patented takes into consideration said conditions of conveyance.

2. We feel that leaving the determination of a patentee's demonstrated devotion of a patented mining claim to the production of mineral materials to the sole discretion of Secretary is unfair.

The patentee has no guarantee that his efforts will be considered satisfactory. There appear to be no specific conditions which when accomplished assure title. The patentee's efforts and investments could be lost because they did not satisfy the Secretary. We feel that such a condition could easily eliminate the exploration and exploitation of many properties and we doubt that much financial support could be had for the exploitation of a claim that could be arbitrarily determined to be an unsatisfactory effort and title thereby lost.

We would very much appreciate a clarification of the intent of Bill 2281 and your feelings on the items we are concerned about.

We appreciate the desire of many to tighten up the mining laws to prevent lands from being acquired for other purposes under the guise of a mining claim and we have no arguments with these desires. It is our interest in the protection of the interests of all citizens that prompts us to write.

Yours very truly,

E. D. SMITH,  
*Assistant Manager, Land Department.*

Senator GRUENING. This completes the list of announced witnesses. Is there anyone else here who wants to add a postscript or say anything on any of the testimony? If so, we want to give them the opportunity. If not, we will stand in recess.

(Whereupon, at 1:40 p.m., the hearing was recessed.)

## APPENDIX A

(Subsequent to the hearing the following communications were ordered printed:)

U.S. SENATE,  
COMMITTEE ON COMMERCE,  
June 29, 1966.

HON. ERNEST GRUENING,  
*Chairman, Subcommittee on Minerals, Materials, and Fuels, Senate Office Building, Washington, D.C.*

DEAR MR. CHAIRMAN: I wish to express my most sincere thanks for your many courtesies yesterday during my testimony on the "common varieties" problem. I share your hope that the Subcommittee can take positive action to resolve this problem in the very near future, and know that the matter is in good hands.

Other commitments yesterday made it impossible for me to remain at the hearings. I have, however, reviewed the statements of most witnesses, and am deeply concerned about the Administration's report and statement on S. 2281. I have never read a more incomplete or distorted statement from any Administration witness.

I am enclosing for your information a copy of a letter I am sending to Acting Solicitor Thomas Cavanaugh.

Again, my thanks for your kindness, and my very best wishes.

Sincerely,

HOWARD W. CANNON.

[Enclosure]

U.S. SENATE,  
COMMITTEE ON COMMERCE,  
June 28, 1966.

MR. THOMAS J. CAVANAUGH,  
*Acting Solicitor, Department of the Interior, Washington, D.C.*

DEAR MR. CAVANAUGH: After testifying today before Senator Gruening's Subcommittee on Minerals, Materials and Fuels, I was unable to remain to hear other witnesses because of commitments at another committee meeting.

I have received your testimony, however, as well as the Department's report on S. 2281.

In my eight years in Congress I have never read a statement from an Administration witness that more distorts a bill under consideration than the one you delivered this morning. Your statement and the official report are startling examples of incompleteness and, apparently, complete disinterest.

The fact that the Department only managed to prepare a report dated today, despite the fact that Committee requested a report months ago, may explain its incompleteness. I am advised that several members of the Committee expressed their concern about the delays in obtaining a report on this bill. I concur wholeheartedly with their observations.

My principal concern, however, involves your statement to the Committee. In discussing my bill, S. 2281, you said the "exclusion of sand, gravel, and rock usable for any construction purpose would come close to abrogating Section 3 and returning to the conditions existing before July 23, 1955. This does not seem to us a feasible solution. The 1955 Act was passed to correct serious misuse of the Public Domain, and *there is no justification for returning to conditions in existence before that statute.*"

Your indication that my bill would do this illustrates that you either did not read the bill or deliberately misrepresented its contents.

My bill does change the definition of "common varieties" to allow the location of sand, gravel and related minerals under certain conditions specifically designed to prevent the "serious misuse of the Public Domain" you mentioned.

S. 2281, far from "returning to conditions in existence before" the passage of Public Law 167, includes features which demand that the land be used for mining purposes.

Section 3A (h), the existence or provisions of which you did not even acknowledge in your statement or the official report, states, "Title to lands patented under this section, based upon mining claims hereafter located, shall revert to the United States if (1) within five years of the date of patent the owner has not, by substantial mining operations, demonstrated to the satisfaction of the Secretary a devotion of the land to the production of mineral materials, or (2) within twenty-five years from the date of patent and prior to the removal of all of the mineral material which may be economically extracted, the lands are devoted, without the prior consent of the Secretary, to any use other than mining or processing operations and uses reasonably incident thereto."

Since this section, designed to protect the interests of the United States against land speculation and other abuses, is contained in the bill and clearly worded, I am at a loss to understand your testimony that the bill would result in a return to conditions in existence before the passage of P. L. 167.

Sincerely,

HOWARD W. CANNON.

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DEPARTMENT OF THE INTERIOR,  
OFFICE OF THE SOLICITOR,  
Washington, D.C., July 5, 1966.

Hon. HOWARD W. CANNON,  
U.S. Senate,  
Committee on Commerce,  
Washington, D.C.

DEAR SENATOR CANNON: This is in reply to your letter to me of June 28, 1966, commenting upon my testimony on that date before the Subcommittee on Minerals, Materials, and Fuels during the hearing on S. 2881 and S. 3485.

Your principal concern was with that portion of my statement made in reference to Section 1(a) of your bill, S. 2281. I said in part that the exclusion of sand, gravel, and rock usable for any construction purpose would come close to abrogating Section 3 (of the Act of July 23, 1955), and returning to conditions existing before July 23, 1955.

As you know, Section 3 of the 1955 Act, removed common varieties of certain non-metallic minerals, including sand and gravel and stone, from the operation of the general mining laws. It was to this aspect of the 1955 act that my remark was addressed. It seemed to me that the provisions of Section 1(a) of S. 2281 are sufficiently broad in scope as to return most, if not all, of the substances which were removed from the category of locatable minerals by the 1955 act to status of locatables. Therefore, to the extent that the status of these substances as locatable or non-locatable as determined by section 3 of the 1955 act is concerned, S. 2281 would come close to abrogating the provision of the 1955 act.

However, I am in complete accord with your position that Section 3A of S. 2281 would afford protections against the misuse of mining claims which did not exist prior to the 1955 act. To this extent the change in section 3 of the 1955 act which would be brought about by enactment of S. 2281 is, indeed, a qualified change. As I indicated in my statement, we found the provisions of S. 2281 which would add a new section 3A to the 1955 act to be very interesting. However, we did not discuss these provisions in detail because we felt they were of limited application. The fact is that there are many desirable features in the proposed section 3A which, as I indicated in my statement, we would prefer to have considered as amendments to the general mining laws.

Another factor which led me to the conclusion I made in connection with section 1(a) of S. 2281 was the provision of Section 3A(j) which provides that the owner of any unpatented mining claim, located prior to the effective date of the section, may elect to make his claim subject to the provisions of the section in a manner prescribed by the Secretary. Because 3A(j) is a part of 3A, it is not clear just how this provision would be applied. Some of our lawyers were of the opinion that under 3A(j) it might be possible to exclude all claims located prior to the effective date of the amendments which would be adopted by enactment of S. 2281 from the operation of the other provisions of Section 3A.

Any uncertainty could undoubtedly be remedied by proper amendment. However, our report and my testimony were necessarily directed to the provisions of the bill as introduced.

While it is regrettable that the departmental report was delayed until the day of the hearing, as I explained to the Subcommittee, a draft report had been prepared but was held up when it was learned that S. 3485 had been introduced. We anticipated that hearings might be held jointly on S. 2281 and S. 3485 and were hopeful that reports could be prepared on both bills which could be forwarded to the Committee at the same time.

I also regret that our report and my statement gave the impression that we were in any way disinterested in the provision of S. 2281. We, of course, did not comment in detail upon all of the features of S. 2281 because we had recommended a substitute amendment which would, if adopted, limit the applicability of the protective provisions of Section 3A of S. 2281 to only a few claims in existence prior to the enactment of the amendment.

The so called "common varieties" provision of the 1955 Act has presented difficulties of interpretation and, consequently, of administration. We have been deeply concerned with this problem as has been the Congress. The fact is that this concern caused us to give very careful consideration to all of the provisions of S. 2281 and should the Committee reject the proposal contained in our report of June 28 on S. 2281, and request a more detailed report on the provisions of the bill, we are fully prepared to reply.

Since your letter indicates that my statement may not have been entirely clear, I am sending a copy of this letter to the Chairman of the Subcommittee with a request that it be made a part of the record of the June 28 hearing.

Sincerely yours,

THOMAS J. CAVANAUGH,  
*Associate Solicitor for Public Lands.*

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NATIONAL CRUSHED STONE ASSOCIATION,  
*Washington, D.C., July 9, 1966.*

Subject: *NCSA Statement on S. 3485*

HON. ERNEST GRUENING,  
*Chairman, Subcommittee on Minerals, Materials, and Fuels, Senate Committee on Interior and Insular Affairs, Washington, D.C.*

DEAR SENATOR GRUENING: Unfortunately, I was unable to reach you yesterday afternoon by telephone after I had determined what NCSA could do in line with our Association policies to present our views on S. 3485.

Enclosed with this letter is a copy of the letter that I have sent Senator Gruening setting forth NCSA's views on S. 3485, and requesting that the letter be incorporated in the record and be considered in the Subcommittee's deliberations.

We request that you place a note in your files indicating the interest of the National Crushed Stone Association in all matters pertaining or applying to the crushed and broken stone industry. Your cooperation in furnishing background information so that we could submit a statement on S. 3485 is appreciated. In view of the situation, you can consider the attached letter as the only statement we will file at the present time on S. 3485.

Very truly yours,

WILLIAM L. CARTER,  
*Executive Director.*

[Enclosure]

NATIONAL CRUSHED STONE ASSOCIATION,  
*Washington, D.C., July 9, 1966.*

HON. ERNEST GRUENING,  
*Chairman, Subcommittee on Minerals, Materials, and Fuels, Senate Committee on Interior and Insular Affairs, Washington, D.C.*

(Subject: S. 3485 and Related Proposals Concerning Valuable Mineral Deposits.)

DEAR SENATOR GRUENING: The purpose of this letter is to set forth the position of the National Crushed Stone Association regarding S. 3485 and similar proposals designed to amend the mining laws of the United States with respect to the definition of the term "common variety."

This subject is a matter of vital concern to the members of the crushed stone industry, particularly so to those who are located in our western states. For this reason, NCSA has, for a number of years, worked closely with interested Congressmen to develop legislation in this area. Understandably, we regret that the Association was not afforded the opportunity to present testimony before your Subcommittee on these proposals and must therefore resort to this letter to set forth the Association's views.

NCSA believes S. 3485 to represent a step in the right direction toward correcting the overly-broad interpretation given by the Department of Interior to the 1955 amendments to the mining laws. Those amendments were intended by the Congress only for the very narrow purpose of putting an end to the abuse of the mining laws by speculators who had no interest in developing mining operations but were interested only in acquiring title to the surface land. They were not intended to prevent bona fide stone, sand and gravel operations from acquiring interest in such deposits under the mining laws.

We are particularly pleased that the Bill recognizes cement and bituminous concrete aggregate to be a valuable mineral deposit. For this reason, while NCSA believes that deposits of stone, sand, and gravel which can be mined, processed, and marketed for still other construction uses should also be considered as valuable mineral deposits, we support the enactment of S. 3485 insofar as it represents a step toward rectifying the current misinterpretation of the 1955 amendments.

On behalf of the crushed stone industry, we respectfully request that this letter be considered in your Subcommittee deliberations and be included in the record of the hearings.

Very truly yours,

WILLIAM L. CARTER,  
*Executive Director.*

BOZEMAN, MONT., June 29, 1966.

MR. STEWART FRENCH,  
*Committee Counsel, Interior Minerals, Materials, Fuels Subcommittee,  
Senate Office Building, Washington, D.C.*

DEAR MR. FRENCH: Pursuant to Senator Metcalf's letter, together, with this letter is enclosed a copy of a letter to Senator Gruening dated August 13, 1965. I would appreciate it if you would include both of these letters in the hearings on Senate Bill 3485.

I have read the bill and believe that it will sufficiently take care of the problem of our company concerning travertine and marble. However, I do have some misgivings as to the general law in the following incidence as set out in my letter of August 13, 1965, as it still does not particularly state whether or not Section 161, Title 30 of the U.S. Codes is repealed. Assuming that Section 161, Title 30, U.S. Codes, is not intended to be repealed by this act nor by the 'common varieties act,' we then have the proposition that a placer claim located under Section 161 will be honored as not being within the purview of the 'common varieties act'.

In this vein, other building stones which can be sawed such as sandstone will present a similar problem which I think will conflict with Section 161. This perhaps could be alleviated by inserting the words "or other building stone" after the word "gabros".

It is my hope that this bill will be passed in order to clarify the 'common varieties act'. However, I do think some thought should be given to the other possibilities of other building stone becoming a problem as marble, limestones and granite have in the building stone field. Further, I believe that Senate Bill 3485 would greatly lessen the confusion that has grown out of the present interpretation placed upon the 'common varieties act' by the administrative branch of the government. I can say for myself and for my company that this bill has our full support.

If there is any other help that we can give you in this matter, please advise us, and thank you for the opportunity to be heard upon this bill.

Very truly yours,

McKINLEY ANDERSON.

[Enclosure]

AUGUST 13, 1965.

Re Public Law 167, Hearing Butte, Mont., June 18, 1965.

HON. ERNEST GRUENING,  
U.S. Senate Building,  
Washington, D.C.

DEAR SENATOR GRUENING: I am sending you this letter in regard to the above-captioned matter as I feel that action on the law known as Public Law 167 is greatly in conflict with Title 30, Section 161 of the U.S. Codes.

As you know, these sections are as follows:

"Any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placermineral claims. Lands reserved for the benefit of the public schools or donated to any States shall not be subject to entry under this section. Nothing contained in this section shall be construed to repeal section 471 of Title 16 relating to the establishment of national forests."

Title 30, Section 601, U.S. Code Annotated provides as follows:

"The Secretary, under such rules and regulations as he may prescribe, may dispose of mineral materials (including but not limited to common varieties of the following: . . . stone . . .) . . . on public lands of the United States, . . . if the disposal of such mineral . . . (1) is not otherwise expressly authorized by law, . . . and the United States mining laws, and (2) is not expressly prohibited by laws of the United States, and (3) would not be detrimental to the public interest. Such materials may be disposed of only in accordance with the provisions of this sub-chapter and upon the payment of adequate compensation therefor, to be determined by the Secretary: . . ."

Title 30, Section 611, U.S. Code Annotated provides as follows:

"No deposit of common varieties of . . . stone . . . shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: *Provided, however*, that nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such deposit. 'Common varieties' are used in sections 601, 603, and 611-615 of this title does not include deposits of such mineral which are valuable because the deposit has some property giving it distinct and special value . . ." (This was passed July 23, 1955)

Also, Public Law 167 conflicts with Title 43 of the Codes of Federal Regulations as set out in circular No. 2149 of the U.S. Department of Interior, Bureau of Land Management, dated July 10, 1964. This was the last publication that I have received from the Bureau of Land Management in Billings, Montana, concerning the regulations in regard to the mining laws of the United States.

On page 7 of the said circular, it stated as follows:

"The act of August 4, 1892 (27 Stat. 348; 30 U.S.C. 161), extends the mineral land laws so as to bring lands chiefly valuable for building stone within the provisions of said laws."

Also, it is provided in the circular at page 25, the following:

"Limestone suitable for use in the production of cement, metallurgical or chemical grade limestone, gypsum, and the like are not common varieties." This subsection does not relieve a claimant from any requirements of the mining laws."

Also, there appears to be a conflict on page 21 of the circular wherein under Section 3470.3 it is provided: 3470.3 Data to be filed in support of application, (a) . . .

"If it be a *building stone* or other deposit than gold claimed under the placer laws, he must describe fully the kind, nature, and extent of the deposit, stating the reasons why same is by him regarded as a valuable mineral claim."

I also wish to point out that "*common varieties*" as defined in Sub-Part 3511, Common Varieties, 40 Code of Federal Regulations and Public Law 167 state:

"(Common varieties) includes any deposits which, *although they may have value in trade, manufacturing, the sciences, or the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits.*"

This conflicts with the law set down in the case of Northern Pacific Railway Company versus Sedeberg, 47 Lawyer's Edition 575, wherein the Supreme Court stated:

"The rulings of the Land Department, to which we are to look for the contemporaneous construction of these statutes, have been subject to very little

fluctuation, and almost uniformly, particularly of late years, have lent strong support to the theory of the patentee, that the words 'valuable mineral deposits' should be constructed as including all lands chiefly valuable for other than agricultural purposes, and particularly as including nonmetallic substances, among which are held to be alum, asphaltum, borax, guano, diamonds, gypsum, resin, marble, mica, slate, amber, petroleum, limestone, building stone, and coal. The cases are far too numerous for citation, and there is practically no conflict in them."

I strongly believe that this is the law of the land and that all changes that appear in Title 40 Code of Federal Regulations are an attempt by the administrative department of government and more particularly the Department of Interior to subvert this decision and the clear intent of Congress under Public Law 167 which is stated distinctly on page 46 of the Bulletin on Multi-use Mining Law Administration and Operation held on January 31 and February 1, 1957, in the 85th Congress, First Session. On page 46 it is stated as follows:

"In recommending the enactment of House of Representatives 5891, the Department understood that the objectives with respect to mining claims to be located subsequent to the passage of the bill were:

(1) To remove certain mineral materials from location under the mining laws and authorize their disposal by permit and lease.

(2) To preserve for mining claimants all rights necessary to prospect for and develop minerals, but to prohibit uses not necessary for, or connected with, mineral development.

(3) To permit the United States to manage the surface resources of mining claims, prior to patent, in such a way as not to endanger or materially interfere with prospecting, mining, or processing operations and uses reasonably incident thereto.

(4) To continue to grant fee simple title to mining claimants through issuance of mineral patent."

For the information of the committee, I wish to point out the growth in the stone industry since 1946. The following is information given to our company by the Worth Start Research Institution, 3100 Thirty-Eighth Avenue So., Minneapolis, Minnesota, which provides in part as follows:

*Value of stone sold or produced in the United States*

	<i>Millions</i>
1946 -----	\$234
1950 -----	391
1955 -----	710
1962 -----	1, 026

The major divisions of the industry include dimension stones, crushed and broken stone, and stone used in manufacturing processes. Some markets are expanding faster than others. Some of these markets vary depending upon such factors as the volume of commercial construction, architectural trends, proximity of construction projects to source of stone, and the competition of artificial products and other materials."

I believe in the basic principles of Public Law 167, I further believe that the law was passed to allow the Federal Government to take care of a vital natural resource which was allowed to be wasted by people who had filed mining claims and yet had not patented them. This allows the timber growing on the claims not to be used and harvested when they should have been. Further, Public Law 167 was intended to prevent people from creating a nuisance by filing mineral and mining claims in timber sale areas or in areas important for recreational use. The basis for filing such spurious claims were based upon common varieties of mineral such as sand, stone, gravel, and pumice. These were items that the Secretary was given authority to control. There was also inserted in the law the word "stone", however, the Federal Government now claims that the word "stone" is modified to the extent that Public Law 167, instead of reading "stone", should read "building stone". Since the large areas of federal land in the western United States are an important source of non-metallic minerals, which make up the mantle of the earth and can be classified as rock or stone, the Secretary is attempting to control all of the building stone industry or to hinder it or to hinder the sales of building stones, rubble stones, crushed aggregates, dimensioned stones and gypsum and commercial grade limestones used for making cement.

It is my opinion that it was not the intent of Congress to repeal the right of the people of the United States to go upon the public lands and take stone which is valuable for building purposes and to repeal by implication Section 161 Title 30 of the U.S. Codes. I fully believe that 30 U.S.C. Section 161 of the United States mining laws is still in force and effect and a valid mining location can be made thereunder notwithstanding any ruling of the Department of Interior, Bureau of Land Management, or the Department of Agriculture.

However, to clarify the mining law, I believe that under Section 3 of Public Law 167 and starting with the words "provided, however," to the end of that paragraph should be more inclusive and should read as follows:

"Provided, however, that nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring or in association with such deposit. 'Common varieties' as used in this act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value.

The following minerals are also exempt from the provisions of this act:

1. 'Black pumice' which occurs in nature in pieces having one dimension of two inches or more.

2. Building stone, including but not limited to, split stone, dimensioned stone, strip stone, ashlar stone, modular stone, and rubble stone; and other stone used for building purposes, including but not limited to, roof chips, exposed aggregates, and all other types of ornamental and decorative stone, and commercial limestone and gypsum.

3. The words '*valuable mineral deposit*' as used for the purpose of this act includes all lands chiefly valuable for other than agricultural purposes, and particularly as including non-metallic substances, among which are held marble, mica, slate, amber, petroleum, limestone, building stone, and coal."

I hope that legislation shall soon be introduced in order to correct the conflict between 30 U.S.C., Section 161 and Public Law 167. If this is done within the near future, our company will be relieved of the expense and cost of appealing any decision of a hearing officer of the pending case against our concern. I further believe that the administrative decision that would be rendered in the case presently pending between Montana Travertine Quarries and the Bureau of Land Management would be decided, and in fact already has been decided, against our company, and that the theory of the Bureau of Land Management, the Department of Agriculture, and the Department of Interior, is to prevent small companies from taking their claims to Federal Court as it is a great expense and cost and burden which they cannot bear.

I further wish to remind you on the point of the expense involved in appealing a decision of the Bureau of Land Management that there should be added to the amendment of Public Law 167 a provision which would allow companies such as ours the right to appeal the decision of the Bureau of Land Management in refusing to grant a patent to the United States District Court in the district in which said mining claim is located in order that a judge trial may hear the evidence and make a determination as to whether the Bureau of Land Management has acted arbitrarily, capriciously, or tyrannically in refusing to grant said patent. Usually the District Judge in the district in which said mining claim is situated is a far better judge as to whether or not the company has a valid mining claim and whether or not the economy of the area deserves to have such an industry developed. I feel that hearing officers which determine the facts by which our Federal Courts are bound by the time the decision against a company is fought through administrative procedures to the District Court in the district in which the mining claim is located does not give a proper presentation of the facts to the Court as an original hearing would.

Needless to say, to expense and cost and present policy of Kaiser Industries which was presented at the hearing in Butte on June 18, 1965, indicated a complete need for revision of this type administrative change and procedure.

I hope that these comments will help you and your committee in some way quickly reaching a decision for revision and resolution of the conflict between Title 30, U.S.C., Section 161 and Public Law 167, as interpreted by the Department of Interior.

I have not received from Stewart French a copy of the transcript made in Butte, Montana, on June 18, 1965, in order that we may correct our statements, and I also would appreciate knowing if the Bureau of Land Management and the Secretary of Interior have filed any answers or information of their department in connection with the hearing. I would certainly appreciate knowing this infor-

mation as we were allowed by your sub-committee the right to rebut any information that would be supplied by the Department of Interior.

If you have any further questions that you wish to be answered by our company or any information that you wish us to seek, please be free to call upon us at any time.

Very truly yours,

McKINLEY ANDERSON.

## APPENDIX B

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(COMMITTEE NOTE.—There is set forth below the text of the very recent (June 21, 1966) opinion of the Ninth Circuit Court of Appeals in a case with direct bearing on many of the issues presented in the subcommittee's hearings in 1965 and 1966 on the interpretations and administration of the Common Varieties Act. The subcommittee is informed that the Interior Department is considering appeal to the Supreme Court, but the ninth circuit's findings are so pertinent to problems which are the subject of the subcommittee's inquiry that wide public knowledge and discussion of the case are deemed desirable.)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20,227

ALFRED COLEMAN and EDWARD J. McCLENNAN, *Appellants*,

*vs.*

UNITED STATES OF AMERICA, *Appellee*.

[June 21, 1966]

On Appeal from the United States District Court, Southern District of California,  
Central Division

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Before: CHAMBERS and JERTBERG, Circuit Judges, and  
THOMPSON, District Judge.  
THOMPSON, District Judge:

Appellant has brought the case here to review the order of the District Court granting summary judgment to Appellee and dismissing Appellant's counterclaim. As originally filed by the United States, the suit was for ejection of Coleman from his mining claims in the San Bernardino National Forest. The claims had been contested by the United States at the instance of the Forest Service in proceedings before the Interior Department and found invalid. In the District Court, Appellant counterclaimed, seeking judicial review of the decision of the Interior Department under the Administrative Procedure Act, 5 U.S.C. 1001, et seq. The initial problem here is the appropriateness of Appellant's counterclaim as a vehicle to obtain judicial review.

We think it settled, at least in this Circuit, that although the Administrative Procedure Act does not permit a trial *de novo* of administrative decisions, *Noren v. Beck*, 199 F. Supp. 708 (D.C. S.D. Cal. 1961); *Adams v. United States*, 318 F. 2d 861 (9 CCA 1963), it does authorize and require judicial review under the standards of the Administrative Procedure Act, *Adams v. Witmer*, 271 F. 2d 29 (9 CCA 1959), *Denison v. Udall*, 248 F. Supp. 942 (D.C. Ariz. 1965), and that a counterclaim is a permissible method of obtaining such review. *Adams v. United States*, supra.

The District Judge rendered judgment for the United States on its complaint and dismissed Appellant's counterclaim, but he did so only after "having considered the files, records and evidence in the case, including the entire certified record of the administrative proceedings." (Tr. 224) In view of this statement, we deem the dismissal of the counterclaim as an affirmance of the decision of the Interior Department on the merits and not as a dismissal because of

some procedural deficiency. This is so because the decision invalidating the mining claims is the sole foundation for the ejectment action.

The eighteen mining claims in question were located as building stone claims (30 U.S.C. 161)<sup>1</sup> on the dry bed of Baldwin Lake and an adjoining mountain within the San Bernardino National Forest during the period of 1949 to 1952. The claims cover an area of 720 acres. An application for patent was filed by Coleman in January, 1956, and a contest was commenced at the instance of the Forest Service on February 24, 1958, the charges being that:

"(a) The lands embraced within the claims are non-mineral in character.

"(b) Minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery.

"(c) \$500.00 has not been expended on Baldwin Lake Quarry Claims No. 7, 9, 11 to 19, inclusive."

The Hearing Examiner, on December 18, 1958, found five of the mining claims to be valid and the other thirteen to be invalid. On appeal, the Acting Director of the Bureau of Land Management, on June 22, 1960, sustained the validity of three claims and part of a fourth. The Secretary of the Interior, acting through his Deputy Solicitor, in considering the appeal taken by Mr. Coleman, reviewed in detail the evidence introduced at the hearing on the contests. The Deputy Solicitor rendered a decision declaring all the subject mining claims to be null and void for the reason that a valid discovery had not been made. *United States v. Alfred Coleman*, A-28557, March 27, 1962. The ejectment action was filed August 8, 1963.

At the outset, we are faced with contentions by the Government seeking to limit the scope of judicial review of decisions in the Department of the Interior. This campaign commenced some years back when first it was broadly contended that the Administrative Procedure Act does not apply to Decisions of the Secretary of the Interior. This Court had no difficulty in rejecting this contention. *Adams v. Witmer*, (9 CCA 1958), 271 F. 2d 29. Cf. *Wong Yong Sung v. McGrath*, 1950, 339 U.S. 33. Next, as in this case, the Secretary has argued that the determination of a question of fact by the "Secretary of Interior, or his authorized representative, is conclusive in the absence of fraud or imposition" and that "decisions of the Secretary of Interior with respect to public lands have historically been accorded a conclusiveness beyond that of typical regulatory agencies." These are not the standards for review provided in the Administrative Procedure Act adopted in 1946 [5 U.S.C. 1009(e)]. The Government supports the limited review of actions by the Secretary of the Interior with the footnoted excerpts from the following cases: *Cameron v. United States*, 1920, 252 U.S. 450;<sup>2</sup> *Standard Oil Co. of California v. United States* (9 CCA 1940), 107 F. 2d 402, 410;<sup>3</sup> and *Best v. Humboldt Mining Company*, 1963, 371 U.S. 334.<sup>4</sup>

<sup>1</sup> § 161. Any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims. Lands reserved for the benefit of the public schools or donated to any States shall not be subject to entry under this section. Nothing contained in this section shall be construed to repeal section 471 of Title 16 relating to the establishment of national forests.

<sup>2</sup> *Cameron v. United States*, 252 U.S. 450, at p. 459:

"By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the land department, as a special tribunal; and the Secretary of the Interior, as the head of the department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved. (Citations omitted.)

"A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws. If valid, it gives to the claimant certain exclusive possessory rights, and so do homestead and desert claims. But no right arises from an invalid claim of any kind. All must conform to the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public.

"Of course, the land department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid, and, if it be found invalid, to declare it null and void."

*Cameron v. United States*, 252 U.S. 450 at p. 464.

"Whether the tract covered by Cameron's location was mineral and whether there had been the requisite discovery were questions of fact, the decision of which by the Secretary of the Interior was conclusive in the absence of fraud or imposition. \* \* \* [Citations omitted.] Accepting the Secretary's findings that the tract was not mineral and that there had been no discovery, it is plain that the location was invalid, as was declared by the Secretary and held by the courts below."

<sup>3</sup> *Standard Oil Co. of California v. United States*, 107 F. 2d 402, at p. 409:

"The disposal of the public lands is not a subject over which the 'judicial power' of the United States is extended. It is a field in which the authority of the Congress is supreme. *Lee v. Johnson*, 116 U.S. 48, 6 S. Ct. 249, 29 L.Ed. 570; Art. IV, sec. 3, clause 2, of the

Our study of these decisions and others has not persuaded us that Congress intended decisions of the Department of the Interior which reject applications for patents to enjoy a more favored position than those of other executive agencies under the Administrative Procedure Act. The *Cameron* case was decided in 1920, some twenty-six years before the Congress had spoken with respect to the scope and standards of judicial review of administrative rulings. Similarly, the *Standard Oil* case in this Circuit was decided six years before the adoption of the Administrative Procedure Act. Nor do we find in the *Best* case any support for the Government's present contentions. True, in that opinion Justice Douglas complimented the work of former Justice VanDevanter and quoted extensively from his opinion in *Cameron*. But the issue decided in *Best* was whether the Government could contest a mining claim administratively during the pendency of a condemnation action, and the Court explicitly, in Fn. 7 (371 U.S. 338), alluded to the present procedures: "Claimants *today* may appeal the Examiner's decision to the Director of the Bureau (43 CFR, 1962 Supp., § 221.1), from him to the Secretary (id., § 221.31), and from there to the courts. Foster v. Seaton, 271 F. 2d 836." Also, in *Best*, the Court significantly refrained from commenting on the claimed onerosity of hearings in the Department as compared with court procedures, and said: "We express no views on those contentions, as each of them can appropriately be raised in the administrative proceedings, and reserved for judicial review." [Emphasis added.]

It has long been established that a qualified entryman upon public lands of the United States, whether as a locator of a mining claim, as a homesteader, or as one asserting rights under others of the multifarious laws governing entries on public lands, who perfects his entry by compliance with the applicable Act of Congress, thereby acquires a right to the land as against the sovereign itself as well as third persons. *Wilbur v. Krushnic*, 1930, 280 U.S. 306. It is such a legal right which Appellant here seeks to assert, and it is not a right which the Secretary of the Interior may, in his discretion, ignore or which he may reject "in the absence of fraud or imposition." This is precisely the kind of right which the Administrative Procedure Act, with its provisions for judicial review, was designed to safeguard from arbitrary, capricious and illegal deprivation by action of executive and administrative agencies. *Adams v. Witmer* (9 CCA 1959), 271 F. 2d 29.

Constitution, U.S.C.A. Where Congress grants public lands to a state, reserving those known to be mineral as of the approval of the survey, it is thought that there is no constitutional impediment to its delegating to any instrumentality it may select the authority of determining, as a fact, what lands fall within the excluded class. Compare *Shields v. Utah & Idaho R. Co.*, 305 U.S. 177, 59 S.Ct. 160, 83 L.Ed. 111. The state or its transferees obviously have no constitutional right to demand the property on terms differing from those imposed. Their claim to the land does not derive from the Constitution. Nor is the power of Congress, under the broad authorization of that document, so limited as to require the fact-finding agency to make its determination at or prior to the approval of survey.

"The problem, then, as we understand it, is not what authority Congress may confer upon the Secretary, but what authority it has conferred in relation to the administration of this grant. If Congress has clothed the Secretary with general authority to administer the grant, and if his decision of fact in this instance was made within the scope of such authority, there can be no doubt that his decision is conclusive on the courts, in the absence, at any rate, of fraud or imposition. The holdings to this effect are too numerous for citation, but among those apposite are *Catholic Bishop of Nesqually v. Gibbon*, 158 U.S. 155, 15 S.Ct. 779, 39 L.Ed. 931; *Cameron v. United States*, 252 U.S. 450, 40 S.Ct. 410, 64 L.Ed. 659; *St. Louis Smelting & Refining Co. v. Kemp*, 104 U.S. 636, 26 L.Ed. 875; *Wright v. Roseberry*, 121 U.S. 488, 7 S.Ct. 985, 30 L.Ed. 1039; *Burke v. Southern Pacific R. Co.*, 234 U.S. 669, 34 S.Ct. 907, 58 L.Ed. 1527; *Johnson v. Drew*, 171 U.S. 93, 99, 18 S.Ct. 800, 43 L.Ed. 88."

*Standard Oil Co. of California v. United States*, 107 F. 2d 402 at p. 410:

"Of course, in order to give conclusive effect to his decision, the Secretary's power in the premises must be exercised within the limits of due process, that is, after notice and hearing and upon evidence. *Cameron v. United States*, supra; *Crowell v. Benson*, supra; *Shields v. Utah & Idaho R. Co.*, supra. Compare *Iron Silver M. Co. v. Campbell*, 135 U.S. 286, 10 S.Ct. 765, 34 L.Ed. 155. But there is here no question of due process. Appellants participated in the proceeding before the department and make no complaint that they were not accorded full opportunity to present their evidence."

<sup>4</sup>*Best v. Humboldt Mining Company*, 371 U.S. 334, at p. 336:

"\* \* \* the department has been granted plenary authority over the administration of public lands, including mineral lands; and it has been given broad authority to issue regulations concerning them."

*Best v. Humboldt Mining Company*, 371 U.S. 334, at p. 337:

"Due process in such case implies notice and a hearing. But this does not require that the hearing be in the courts, or forbid an inquiry and determination in the Land Department.' *Orchard v. Alexander*, 157 U.S. 372, 383. If a patent has not issued, controversies over claims 'should be solved by appeal to the land department and not to the courts.' *Brown v. Hitchcock*, 173 U.S. 473, 477. And see *Northern Pacific R. Co. v. McComas*, 250 U.S. 387, 392."

The Government also argues that we are here dealing with a "collateral attack" upon final agency action rather than a direct review thereof, and that the judicial surveillance of agency action is, therefore, under a more restrictive standard. The argument is made because after the Secretary's final decision on March 27, 1962, nothing was done by anyone until the United States filed this ejectment action on August 8, 1963. Appellant then sought review of the agency action by counterclaims. *Adams v. United States* (9 CCA 1963), 318 F. 2d 861, involved a similar procedural situation and a dictum there [p. 867] suggested a possible distinction. Upon reflection, however, we cannot discern any reason for a difference respecting the scope and character of review of agency action which would depend upon who commenced the action. This should not be a race to the courthouse. There is no statutory time limit for an aggrieved person to seek judicial review of agency action in the Department of the Interior under 5 U.S.C. 1009.<sup>5</sup> So far as the Government's present contention is concerned, had Coleman brought an action to review the Secretary's decision one day before the eviction suit was filed, this would have been a direct review rather than a so-called "collateral attack." It serves nothing to talk about collateral attack merely because review of agency action is sought in a counterclaim rather than in a complaint.

The issues, then, which faced the District Court are those provided in the Administrative Procedure Act. Were the "agency action, findings and conclusions . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "unsupported by substantial evidence?" 5 U.S.C. 1009(e) (B) (1) (5).

In one form or another, each of the decisions rendered within the Department in this case was based upon the issues raised by the second charge of the contest, (b), that a valid discovery had not been made.

In order to validate a mining claim under the mining laws of the United States, there must be a discovery of a valuable mineral deposit within the limits of the claim. 30 U.S.C. 23, 25. The basic test used to determine whether such discovery has been made was stated by the Department in *Castle v. Womble*, 19 I.D. 455, 457 (1894), to be that:

"\* \* \* where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met."

The standard has been judicially approved. *Chrisman v. Miller*, 197 U.S. 313; *Cameron v. United States*, 1920, 252 U.S. 450; *Best v. Humboldt Mining Co.*, 1963, 371 U.S. 334.

All mining claims must meet this test to be valid. An additional element to the test of discovery, that of present marketability, has been imposed by the Department where the mineral in question is one of widespread occurrence. The reason for this additional element was made clear in *Foster v. Seaton*, 271 F. 2d 836, 838 (1959):

"With respect to widespread non-metallic minerals such as sand and gravel, however, the Department has stressed the additional requirement of present marketability in order to prevent the misappropriation of lands containing these materials by persons seeking to acquire such lands for purposes other than mining."

On July 23, 1955, Congress enacted what is now Section 611 of Title 30, United States Code. Section 611 provides, in part, that "No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders . . . shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws \* \* \*." The purpose of § 611 is clearly revealed in the following quotation from House Report 730, 84th Cong., 1st Sess., 1955, U.S. Congressional & Administrative News, p. 2478:

"The Committees on Interior and Insular Affairs of both the House and Senate have in the past several years been made increasingly aware of the abuses under the general mining laws by those persons who locate mining claims on public lands for purposes other than legitimate mining activity."

<sup>5</sup> While the statute (5 U.S.C. 1031, et seq.) which vests exclusive jurisdiction in the Courts of Appeals to review final orders of certain federal agencies limits the time for such petitions (§ 1034), we find nothing in the Administrative Procedure Act (5 U.S.C. 1009) relating to review of agency action generally, nor in the Department of Interior rules and regulations, which prescribes a time limitation for district court actions to review final administrative determinations.

Thus, by enacting § 611, Congress addressed itself to the very problem which the *Foster v. Seaton* test was designed to resolve. Although *Foster v. Seaton* was decided in 1959, it was a review of a Secretary's decision on a contest initiated before 1955 and applied an Interior Department decision made in 1933 in *Layman v. Ellis*, 54 I.D. 294.

The Department's use of Section 611 in this case, as reflected by the final agency decision, constitutes a misapplication and misconstruction of the statute. In the final decision, the Deputy Solicitor stated:

"\* \* \* Since the Congress withdrew common varieties of building stone, sand and gravel from location under the mining laws on July 23, 1955 (30 U.S.C., 1958 Ed., sec. 611), it was incumbent upon Coleman to show that all the requirements for discovery of a valuable mineral deposit, including a showing that these materials could have been extracted, removed, and marketed at a profit, had been met by that date \* \* \*."

"In view of the immense quantities of identical stone in the area outside the claims, the stone must be considered a 'common variety' within the meaning of the act.

"\* \* \*  
"The only issue in dispute at the hearing on September 16, 1958, was the existence of a market for profitable sales before July 23, 1955. \* \* \* I am unable to find evidence which supports such conclusion as to any of the claims."

We disagree and conclude that proof of discovery as of the time of the contest proceedings is all that is required in this case; that is, that contrary to the Department's assumption, the term "stone" in § 611 does not include "building stone" as that term is used in § 161 and that, therefore, § 611 does not apply at all.<sup>6</sup>

One of the methods adopted by Congress in 1955 to curtail abuses of the mining laws was the exclusion from previously locatable minerals of common varieties of sand, gravel, pumice, pumicite and cinders. Yet, recognizing that this statutory barrier to abuses of the mining laws was so broad as to cover non-abusive mining claims, the Congress narrowed the scope of the Act by defining "common varieties" in a limited way. As stated in House Report 730, supra: "The last sentence of this section declares that—

"'Common varieties' as used in this Act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value \* \* \*."

which language would exclude materials such as limestone, gypsum, etc., commercially valuable because of 'distinct and special' properties." As finally

<sup>6</sup> The Department's interpretation of § 611 as including building stone is at least its second attempt in the history of the mining laws to exclude building stone from the coverage of those laws. The first attempt was thwarted by Congressional action, and we do not believe that the present one is sustainable. The earlier history of building stone as a locatable mineral was succinctly stated in House Report 1204, 52nd Congress, 1st Session, as follows: "In the case of *Rosse vs. Waiman*, 14 M. & W., 859, (same case, 2 Exch., 200, and 15 L.J., 67), it was held (quoting syllabus):

"The term 'mineral' is more frequently applied to substances containing metals, but in its proper sense includes all fossil bodies or matters dug out of mines; in this sense beds of stone may be included in the word minerals."

"So in the case of *Micklethwait vs. Winter*, 6 Exch., 644 (same case, 5 Eng. L. & E., 526); and *Midland R. Co. vs. Checkley*, Law R., 4 Eq., 24, it was held that stone taken from quarries is a mineral."

"The above has been the construction given the mining laws of the United States by the Interior Department since the act of 1872 was passed, until a very recent date, and even now all kinds of stone are held to be subject to mineral entry except building stone, the test applied being uniform with regard to all mineral substances, viz, whether or not the land containing such substance is more valuable therefor than for agricultural purposes. In the case of *Conlin vs. Kelly*, decided in the Department January 2, 1891, and reported in 12 Land Decisions, 1, however, it was held that lands which contain deposits of building stone only are not subject to entry under the mining laws. This decision has brought dismay and threatened ruin and disaster to many citizens who in good faith, relying on the settled and long-continued procedure of the General Land Office, had invested large sums of money in the development of stone quarries upon the public lands, expecting to obtain patents under the mining laws. It changes what had become a recognized rule of property, and the committee think this is a matter which justly demands the action of Congress to fix the status of such lands without the possibility of doubt."

Accordingly, Congress enacted Section 161 "to fix the status" of building stone lands. Cf. *Northern Pacific Ry. v. Soderberg* (1903), 188 U.S. 526. Graceful acceptance of this Congressional mandate proved impossible for the Department in the long run. First the present marketability requirement as expressed in *Foster v. Seaton* was applied to the exclusion of the *Castle v. Womble* test of discovery, thereby imposing an onerous burden on the building stone miner. Then followed the attempt to use § 611 to eliminate building stone as a discoverable mineral, an interpretation of that section which we believe was not intended by the Congress.

enacted, §611 also excluded from its "common varieties" classification "so-called 'block pumice' which occurs in nature in pieces having one dimension of two inches or more."

When §611 was enacted, Congress was of necessity well aware of its earlier statute (Sec. 161) respecting building stone. Nowhere in the available legislative history of §611 is there found any indication of a Congressional intent to repeal §161. Certainly there was no express repeal, and repeals by implication are not favored. *United States v. Zacks*, 375 U.S. 59 (1963); *Silver v. New York Stock Exchange*, 373 U.S. 341, rehearing denied 375 U.S. 870 (1963). It is a settled rule of statutory construction that a general law is not held to repeal or supersede an earlier specific law in the absence of a definite expressed intention. *Stewart v. United States* (9 CCA 1939), 106 F. 2d 405; *Anderson v. Gladden*, D.C. Ore. 1961, 188 F. Supp. 666 aff. 293 F. 2d 463. Stone which is chiefly valuable as building stone is, by that very fact, not a common variety of stone. Thus, §611 does not bar location of mining claims for building stone under §161. The Department's "quantity equals common variety" formula is not consistent with either the letter or the spirit of the 1955 statute, and represents a departure from the earlier and, we think, correct position of the Department as expressed by the Bureau of Land Management in two letters appended to Appellant's brief.<sup>7</sup> One letter, Dated October 11, 1957, signed by Max Caplan "for the Director", states: "Stone, commercially valuable because of distinct and special properties, such as \* \* \* stone suitable for cutting into blocks or naturally cleavable into slabs for building purposes, \* \* \* would not be considered common varieties."

The other letter, dated February 9, 1959, signed by W. L. Shafer "for the Director" contains virtually identical language. Whether or not these letters represent an official position of the Department need not concern us as we decide, as a matter of law, that the existence of § 161 precludes application of § 611 to building stone.

The Interior Department decisions and regulations and Court rulings over the years have been interpretations of the General Mining Law of 1872 (17 Stat. 91), with respect to the validity of mining locations and applications for patents of mining claims, has remained virtually unchanged since enactment. The problem here presented concerns the interpretation of "valuable mineral deposit" (30 U.S.C. 22) and "valuable deposits" (30 U.S.C. 29) as used by the Congress. See *Adams v. United States* (9 CCA 1963), 318 F. 2d 861, 870. Since *Castle v. Womble*, supra, the basic, judicially approved, standard of discovery of a valuable mineral requires proof that a person of ordinary prudence would be justified in further expenditure of his labor and means, with reasonable prospect of success, in developing a paying mine. "But value, in the sense of proved ability to mine the deposit at a profit need not be shown." *Adams v. United States*, supra. This is clearly the standard applied to metallic minerals and minerals of limited occurrence. There is nothing in the mining laws which justifies a different standard for non-metallic minerals or minerals of widespread occurrence insofar as proof of a "valuable" mineral discovery is involved. In fact, with respect to building stone, the Congress has expressly stated: "Any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of law in relation to placer-mineral claims." 30 U.S.C. § 161. (Emphasis added.) Thus it was implied that building stone claims must meet the same standards, and no greater standards, than those for the discovery of other valuable minerals. Cf. *Mulkern v. Hammitt*, (9 CCA 1964), 326 F. 2d 896, sand and gypsum claims.

What, then, is the import of *Foster v. Seaton*, (D.C. Cir. 1959), 271 F. 2d 836, and the Interior Department decisions which it followed? On casual reading, it appears to add additional, administratively imposed, non-statutory requirements for the discovery of "valuable" minerals of widespread occurrence. These are: "Accessibility, bona fides in development, proximity to market, existence of present demand and other factors (to show that) the deposit is of such value that it can be mined, removed and disposed of at a profit." As interpreted by the Department of the Interior in the present case, as well as others, these are tests of the discovery of a "valuable" mineral deposit and have resulted in an absolute requirement that the locator prove a present profit, in derogation of the rule of *Castle v. Womble*. We suggest that this is an incorrect interpretation

<sup>7</sup> These letters are not part of the evidentiary record before this Court. However, as an aid to our decision of a matter of law, we believe it proper to notice them.

of the *Foster* case for the following reasons: (1) There is nothing in the general mining law authorizing location of valuable minerals which justifies, or even suggests, a distinction between minerals of widespread occurrence and minerals of more limited occurrence; thus, the interpretation is not based upon the voice of Congress but is legislative in character; (2) the purpose of the requirements is "to prevent the misappropriation of lands containing these materials by persons seeking to acquire such lands for purposes other than mining" (*Foster v. Seaton*, 271 F. 2d at 838), an objective which is substantially unrelated to the factual determination of discovery of a "valuable" mineral under the *Castle v. Womble* criteria; (3) the Interior Department decisions after the leading case, *Laymen v. Ellis*, 52 I.D. 714, 54 I.D. 294, represent misapplications and unwarranted extensions of the expressed rationale and basis of that decision; and (4) at least one of the requirements stated, "bona fides of development", has nothing at all to do with proof of present marketability at a profit.

We think that *Foster v. Seaton*, on proper analysis, is judicial recognition of the requirement of the good faith of the applicant for a mineral patent, a requirement which finds a foundation in the Act of Congress, for 30 U.S.C., § 29 provides: "A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person \* \* \* having claimed and located a piece of land for such purposes \* \* \* may file, etc." This is an explicit statement that the purpose and motive of the applicant are proper subjects of inquiry and that if the claims were located in bad faith and not for the purpose of mining valuable mineral deposits, the application for patent may be rejected.<sup>8</sup>

The confusion which has been caused by the Department's efforts to distinguish between non-metallic and metallic minerals and between minerals of limited and of widespread occurrence in defining standards for a discovery of valuable mineral under the mining laws, distinctions which have no basis in the statutes, is demonstrated in the mining texts, *American Law of Mining*, Vol. I, § 4.26, pp. 646-647:

"While the Land Department decisions do present some rather extreme examples of stringency and harshness in applying the prudent man test to mining claims, this should not be taken to indicate that the same rigid standards will be applied in all cases, especially where there have been no withdrawals; no one has protested the issuance of patent; a contest has not been instigated by the Forest Service or other agency; and the claims are in fact located in good faith for the purpose of acquiring the land because of its mineral deposits. The Land Department has not looked favorably upon attempts to acquire public domain land having values for subdivision, recreational, timber or other uses by the device of locating mining claims for minerals which are sometimes of dubious value. If not convinced of the good faith of the mining claimant in such situations, it seems probable that the mineral examiners, hearing officers and other officers and agents of the Land Department will take a very strict view of mining locations in such areas and that the prudent man test will be applied very strictly, verging on a commercial value requirement, even where the minerals in question have intrinsic value.

"This is not to say that mining claims cannot be legitimately made and the discoveries thereon supported where the land is valuable for reasons other than its mineral content, but the burden of sustaining such claims is greatly increased in such cases."

The leading Interior Department decision from which stems the present departmental requirement of proof of present marketability at a profit for patent-

<sup>8</sup> This implication from the mining laws is recognized in the Departmental regulations: 43 C.F.R. 3413.1 "No lode claim shall be located until after the discovery of a vein or lode within the limits of the claim, the object of which provision is evidently to prevent the appropriation of presumed mineral ground for speculative purposes, to the exclusion of bona fide prospectors, before sufficient work has been done to determine whether a vein or lode really exists."

43 C.F.R. 3452.1 (pertaining to proving title under 30 U.S.C. 38): "When an applicant desires to make his proof of possessory right in accordance with this provision of law he \* \* \* will be required to furnish \* \* \* any additional facts within the claimant's knowledge having a direct bearing upon his possession and bona fides \* \* \*."

43 C.F.R. 3470.3: "In placer applications, in addition to the recitals necessary in and to both vein or lode or placer applications, the placer application should contain, in detail, such data as will support the claim that the land applied for is placer ground containing valuable mineral deposits not in vein or lode formation and that title is sought not to control water courses or to obtain valuable timber but in good faith because of the mineral therein." (Emphasis added.)

ability of locations claiming minerals of widespread occurrence is *Layman v. Ellis*, (1929), 52 I.D. 714, aff'd 54 I.D. 294. The first decision, holding sand and gravel to be locatable minerals, does not discuss the requirements for proof of discovery of valuable minerals, but cites *Lindley on Mines*, § 98:

"The mineral character of the land is established when it is shown to have upon or within it such a substance as—

"(a) Is recognized as mineral, according to its chemical composition, by the standard authorities on the subject; or—

"(b) Is classified as a mineral product in trade or commerce; or—

"(c) Such a substance (other than the mere surface which may be used for agricultural purposes) as possesses economic value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts;—

"And it is demonstrated that such substance exists therein or thereon in such quantities as render the land more valuable for the purpose of removing and marketing the substance than for any other purpose, and the removing and marketing of which will yield a profit; or it is established that such substance exists in the lands in such quantities as would justify a prudent man in expending labor and capital in the effort to obtain it."

The decision concludes that "valuable gravel deposits fall within categories (b) and (c) of Mr. Lindley." It is noted that Lindley suggested proof of present marketability at a profit as an alternative to the *Castle v. Womble* test. When Acting Solicitor (now Judge) Fahy reviewed and affirmed the decision (1933, 54 I.D. 294), he explained:

"The main objection that appeared to the application of this principle to such commonplace substances as sand and gravel, was that it would render facile the acquirement of title to numerous areas containing sand and gravel for other purposes than mining, but this objection may be urged with as much reason against other mineral substances of wide occurrence and extent which under the same limitations and qualifications are locatable and enterable under the mining law, such as, for example, limestone, marble, gypsum, and building stone. Furthermore, the objection mentioned is not of much force when it is considered that the mineral locator or applicant, to justify his possession, must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit. Cases have been frequent where the Department has refused patent to lands containing the mineral substances last mentioned in abundance, where the evidence as to the value of the deposit was insufficient or lacking. No reason is seen, therefore, to overrule the case of *Layman et al. v. Ellis*. It follows that sand and gravel which can be extracted, removed, and marketed at a profit, obtained from land that has been duly and properly located under the mining law as a placer claim, may be lawfully disposed of for use, not only on Federal aid highways, but for other purposes."

This is the genesis of the Department's absolute requirement of proof of present marketability at a profit to sustain a location of minerals of widespread occurrence. *Estate of Victor E. Hanny*, 63 I.D. 369 (1956); *United States v. Everett Foster, et al.*, 65 I.D. 1 (1958), aff'd *Foster v. Seaton*, 271 F. 2d 836 (1959); *United States v. Strauss*, 59 I.D. 129 (1945); *United States v. George W. Black*, 64 I.D. 93 (1957); *United States v. Barngrover*, 57 I.D. 533 (1942); *United States v. Fife*, A-28386 (Sept. 19, 1960); *United States v. Philip Jungert*, A-28199 (April 14, 1960); *United States v. Jacobo Armenta*, A-28248 (June 22, 1960). We think the foundation does not support the structure. The *Ellis* cases, as was articulated in *Foster v. Seaton*, deal with the purpose of the location, in essence, the bona fides of the claimant, and seek to preclude the seizure of public lands for purposes other than mining under the mining laws. We perceive no reason for a distinction between a placer claim allegedly for gold bearing sand and a placer claim for building stone with respect to the requirements for proof of presence of a valuable mineral. The prudent man test of *Castle v. Womble* should suffice for either. Cf. *Mulkern v. Hammit*, supra, sand and gypsum; *Adams v. United States*, supra, sand and gold; *Henrikson v. Udall* (9 CCA 1965), 350 F. 2d 949, 229 F. Supp. 510, sand and gravel. In addition, the applicant may be required to show, if challenged to do so, that the claims were located in good faith for the minerals therein, and not for other unrelated purposes.

This, of course, is not to suggest that the *Foster v. Seaton* guidelines of accessibility, bona fides in development, proximity to market and existence of a present demand and other factors are irrelevant as evidence bearing upon the

ultimate issues of good faith and existence of a valuable mineral deposit. But these ultimate issues should be resolved in each case from the evidence as a whole and it is improper, in our view, to convert one aspect of relevant evidence into an absolute legal requirement with respect to a certain class of minerals in derogation of a timehonored, judicially approved test of "value" applicable to all locatable minerals.

Inasmuch as this case should be remanded to the Department for reconsideration under correct legal standards, there are other matters which deserve brief comment. In his final decision, the Deputy Solicitor remarked that the Appellant did not make the required showing of marketability as to all claims. He said: "Whether expenditures for improvements on other claims may or may not be credited to these (disallowed) claims is immaterial because it is abundantly clear that there was no marketing of any products from these claims." The *Castle v. Womble* prudent man test does not require such a showing, although such evidence is, of course, relevant proof under the issue as to each separate mining claim. The *Castle v. Womble* test implies a forecast of the reasonably anticipable future. Further, the Department placed great weight upon Coleman's testimony that he had devoted over four thousand hours working on the claims for eight or nine years, which computed at \$3.50 per hour, meant an expenditure of \$157,500 in labor, and concluded that Coleman could not conceivably have made a profit. We have found no case authority on the subject of whether the calculated value of a locator's labor in developing, the property should be charged as an expense in determining profitability.<sup>9</sup> This may be because the question has not arisen under the *Castle v. Womble* test of reasonable expectation of profit, while the Departmental requirement of proof of present profit for location of non-metallic minerals of widespread occurrence is of fairly recent origin. In any event, the history of prospecting and mining in the Western United States records the essence of individualism in economic activity and the Mining Law of 1872 was enacted as a Congressional codification of the procedures and practices of miners. Academic economics has little meaning for a miner and his "profit" is made if his receipts exceed his out-of-pocket expenditures, although he may be grossly underpaid for his labor.

Coleman represented himself in the evidentiary hearing before the Hearings Examiner in 1958 and throughout the administrative appeals. He was quite evidently bewildered by the Government's assertion that the claims were not mineral in character and that there had been no discovery of valuable minerals, relying with assurance, and some justification we have found, on 30 U.S.C. 161. Although he was properly guided by the Hearing Examiner, to a degree, his lack of awareness of the issues upon which the case was ultimately determined by the Secretary is evident. We think that if the Department of Interior intends to put in issue Coleman's good faith as an applicant for patent, it should so state in the contest complaint. Under the circumstances, the whole proceeding should be remanded to the Department.

In summary, we hold:

1. The decision of the Secretary of Interior invalidating Coleman's building stone claims was properly before the District Court for review under the counterclaim.
2. The standards of review are those elucidated in the Administrative Procedure Act (5 U.S.C. 1009).
3. Congress, by enacting 30 U.S.C. 611, did not repeal 30 U.S.C. 161 concerning building stone, and proof of discovery of a valuable mineral is to be determined as of the date of the contest hearing and not as of July 23, 1955.

<sup>9</sup> The Director of the Bureau of Land Management, in his decision in this case, minimized the weight of this testimony, saying:

"The record shows that stone has been removed and marketed from those claims ever since their location in 1949. Income from past sales has just about equalled the cost and value of improvements without allowance for any recompense to Mr. Coleman for his own labor. Be that as it may, it is good accounting procedure to amortize the cost of permanent improvements over a long period of time; current and/or future expenditures for maintenance will be far less than the initial costs. Under such circumstances, continued sales, even at the rate shown for the first ten years of operations have and will result in a livelihood to Mr. Coleman; he will realize a profit from operations over and above the value of his own labor. It matters not that the stone operations may not sustain a mammoth operation by a large company; it is sufficient that a prudent man be justified in expending labor and means with a reasonable prospect of success in developing a paying mine. Since a continuing and steady market, albeit not expanding, is shown to exist, and marketability of the product at a profit (even though not a great one) is shown, discovery within the meaning of the mining laws, all else being regular, is established."

4. The applicable criteria of presence of a valuable mineral in each of the claims is whether a person of ordinary prudence would be justified in further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine.

5. If the good faith of the applicant in locating the ground for the asserted purpose of exploiting the minerals therein is an issue, the applicant for patent should be put on notice of the issue in the contest complaint.

6. The decision of the Secretary of the Interior invalidating Coleman's mining claims is not in accordance with law and, under the circumstances related, is arbitrary, capricious and an abuse of discretion, and should be set aside.

Accordingly, this case is remanded to the District Court with instructions to enter judgment denying plaintiff's prayer for ejectment and, on the counterclaim, reversing the final decision of the Secretary of the Interior and remanding the case to the Department of the Interior for further proceedings and decision in accordance with the principles herein enunciated.



