



UNITED STATES v. JOHN H. McKOWN

181 IBLA 183

Decided June 30, 2011

Editors Note: Appeal DENIED, decision AFFIRMED, John H. **McKown IV** v. **United States** of American et al., 1:09-cv-00810-SKO, Docket No. 62, Order November 5, 2012.



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

UNITED STATES
v.
JOHN H. McKOWN

IBLA 2010-179

Decided June 30, 2011

Appeal from a decision by Administrative Law Judge James H. Heffernan declaring three mining claims invalid. CACA 49149.

Affirmed.

1. Administrative Procedure: Burden of Proof--Evidence: Preponderance--Evidence: Prima Facie Case--Mining Claims: Contests

In a mining contest, the Government establishes a prima facie case when its mineral examiners testify they examined the claim and either found no mineral exposure within the limits of that claim or that a claim's exposed mineral deposit is of insufficient quality and quantity to support the development of paying mine.

2. Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally--Mining Claims: Withdrawn Land

Drilling to obtain core samples will be allowed if its purpose is to establish the quantity and quality of exposed mineralization that would support a discovery. In order to drill on withdrawn land, the claimant must show that a valuable mineral has been exposed on the claims and that a discovery would be confirmed by such drilling.

3. Administrative Procedure: Adjudication--Mining Claims: Generally--Mining Claims: Contests--Mining Claims: Determination of Validity--Rules of Practice: Government Contests--Rules of Practice: Hearings

In an appeal from a decision after a hearing on a mineral contest complaint, where the Administrative Law Judge weighed the evidence presented, considered the parties' arguments of fact and law, and issued a decision setting forth the evidence presented and conclusions reached, the appellant must show error in that decision with some particularity and support its claims of error with citations to the record or other evidence. An appellant who fails to do so cannot be afforded favorable consideration; conclusory allegations of error do not suffice.

4. Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

For a mining claim to be valid, it must be shown that minerals within the claim are of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine. Assumptions regarding a prudent person are based on objective standards related to the nature of the mineral deposit disclosed on the claim, and not on the attributes or circumstances of the claimant. A mining claimant must show, as an objective matter and as a present fact, that there is a reasonable likelihood that a paying mine can be developed. Testimony concerning subjective beliefs, standing alone, does not constitute objective proof that a paying mine can be developed.

APPEARANCES: Moises A. Aviles, Esq., San Bernardino, California, for Appellant; Jeff Moulton, Esq., Rose Miksovsky, Esq., Office of General Counsel, U.S. Department of Agriculture, San Francisco, California, for the Government.

OPINION BY ADMINISTRATIVE JUDGE JACKSON

John H. McKown has appealed the May 25, 2010, decision by Administrative Law Judge (ALJ) James H. Heffernan on a mineral contest complaint initiated by the United States. After a 3-day hearing, ALJ Heffernan concluded that certain lode mining claims, White Cap Nos. 1-3, were located on public lands prior to their

withdrawal from mineral entry but that they are invalid for lack of discovery of a valuable mineral deposit.¹ For the reasons discussed below, we affirm his decision.

Background

Although a quartz deposit was developed by excavating a pit in sec. 16, T. 27 S., R. 36 E., Mount Diablo Meridian, during the 1950s, no activity, “other than an occasional surface sample collected for analysis,” has since occurred at that site. Ex. 23 at 17, Validity Examination of the White Cap #1, #2, and #3 Lode Mining Claims, approved on March 5, 2007 (Mineral Report). This pit is referred to by the U.S. Geological Survey as the Great White Way deposit and prospect in a report entitled “Mineral Resource Potential of the Scodies Roadless Area, Kern County, California” (Open File Report 83-510), that describes mineral resource potential and states the “quartz vein of the Great White Way prospect is too small and too far from markets to be of commercial value.” Mineral Report at 17-18 (quoting from Open File Report 83-510 at 10, Ex. 32²). McKown located lode mining claims that included and were near the Great White Way prospect, but after he failed to maintain those claims, they were declared null and void as of September 1, 1993. In October of 1993, McKown relocated his claims, identifying them as White Cap Nos. 1, 2, and 3. Ex. 2.³ Shortly before his location notices were filed, McKown executed a “Letter

¹ McKown timely filed a statement of reasons (SOR) and a Reply to the Government’s Answer. The record submitted by the Government includes the parties’ pleadings in the proceeding below, a sequentially paginated hearing transcript (three volumes), and the exhibits presented at that hearing. The United States’ exhibits are sequentially numbered and are so identified herein (*e.g.*, Ex. 2); McKown’s exhibits are identified alphabetically and include tabbed documents, which we refer to by exhibit and tab (*e.g.*, Ex. B-1).

² This U.S. Geological Survey report, Ex. 32 at 8-10, earlier states:
 Three large quartz veins and pods were found in the roadless area
 The largest of these is at the Great White Way prospect (Silica Hill) and was mapped and sampled by the [U.S. Bureau of Mines]. Troxel and Morton (1982) briefly describe this deposit, where considerable quartz without visible mineralization was explored in the late 1950’s by means of a pit. The quartz is massive, milky white, and in contact with diorite and grandiorite. There is an estimated 22,000 tons of quartz; minor silver values and trace amounts of other metals limit use to aggregate or possible decorative stone.

³ As described in those location notices, his discovery post is in the pit at the center of White Cap No. 1, which goes 750 to the east and west and 290 feet to the north

(continued...)

of Intent” that stated he was evaluating his claims to determine the quality of the deposit and its true value, would be taking “small samples of surface silica,” and might sell his mineral rights to these claims in the future. Ex. 1.

The California Desert Protection Act (CDPA), 108 Stat. 4472 (1994), was enacted on October 31, 1994. It designated certain BLM and U.S. Forest Service (Forest Service) lands as the Kiavah Wilderness, withdrew them from mineral entry and location, and directed that they be administered as part of the Wilderness Preservation System under the Wilderness Act, subject to valid existing rights. See CDPA, sections 102(31), 103, 108 Stat. 4476, 4481 (1994), 16 U.S.C. §§ 1132(31), 1133 (2006). White Cap Nos. 1, 2, and 3 are on Forest Service lands within the Sequoia National Forest and the Kiavah Wilderness. See Mineral Report at 3; *id.*, Map 4.

By letter dated December 27, 1994, McKown submitted a notice of intent (NOI) to the Forest Service, stating the “proven reserve” exposed at the pit contains 36,450 tons of quartz and that he would be escorting prospective buyers and taking small surface samples and might drill two holes on the claims in the spring, which would disturb less than 5 acres and obtain core data for more accurately estimating the volume of the deposit.⁴ Ex. 4 at 1-2. Based on sampling, testing, and a report by Robert J. Michel, Ph.D,⁵ McKown also represented that the value of this deposit was more than \$65 million. *Id.* at 2. The District Ranger responded on February 16, 1995, informing McKown that a detailed Plan of Operations must be filed before he could perform any of the work described in his NOI and that the Forest Service would review his plan to determine whether this quartz deposit was locatable, adding that if it was, his “work can proceed.” Ex. 6 at 1. The District Ranger also informed him that if his work “would cause a significant surface disturbance,” a Valid Existing Rights Determination would be conducted before that work could be approved and separately stated that Michel’s report was under review by the Forest Service. *Id.*

³ (...continued)

and south of that post. His post is also in the center of White Cap No. 3, which is perpendicular to No. 1 and goes 750 feet to the north and south and 290 feet to the east and west of that post. White Cap No. 2 is immediately adjacent to No. 1, going 1500 feet further to the west.

⁴ McKown’s NOI states one hole would be “straight down at the discovery point” and that the other would be “at the same site at an approximate angle of 40 degrees down and to the east.” Ex. 4 at 2.

⁵ Although Michel held a Ph.D and a patent for purifying mineral materials, his discipline and expertise are not otherwise described in the record.

The report by Michel, entitled *Survey and Evaluation of the Quartz Mining Property Called White Cap Owned by John McKown*, represents that he: inspected and took surface samples at the pit in September; estimated its “open intrusive veins” were 40 x 50 x 300 feet; calculated the tonnage of the deposit at 36,450 tons; analyzed a composite sample showing its silica (SiO₂) content was 99.50%; identified multiple industrial markets for silica of that quality (e.g., laboratory glassware); and based on tonnage, quality, and market prices for those industrial uses, determined that the value of the deposit was \$72.9 million, “which is a very conservative estimate because, as no drilling was performed, it is very possible that this intrusive vein is very deep (several hundred feet) and more widely covered by soil and debris.”

Ex. B-9 at 2, 4. The Forest Service review of that report was by Jim Voss, a certified mineral examiner. Ex. 8. Voss stated the report’s limited sampling and analyses were statistically insufficient to show the quality of the deposit for any identified use and that the report failed to discuss the specifications for any identified industrial use, and while specialized glass manufacture was a possibility, the value of quartz in that market “would be very much lower” than the \$0.90 per pound assumed by Michel. *Id.* at 3. Voss noted that a locatable mineral “must be suitable and used” in an identified market and concluded that “[t]here is no substantial data to support the presence of any specific markets for this quartz material in the report.” *Id.*

The District Ranger informed McKown of Voss’ review and conclusions on April 5, 1995, and stated that if any of his proposed work “would cause surface disturbance on your claims, you must file a detailed plan of operations.” Ex. 9; *see also* Ex. 10 (Voss Corresp. to McKown, dated Sept. 8, 1995). McKown did not file a Plan of Operations with the Forest Service until March 10, 2000. Ex. 11. In response, the District Ranger requested a validity examination on June 30, 2000; Michael D. Dunn, Certified Mineral Examiner, was assigned as lead examiner. Mineral Report at 5. McKown and his representative, Rick Miller, were then informed of the process, requested to provide additional information to support a discovery, and given an opportunity to participate in the field examination. *Id.* at 5-6.

The Validity Examination and Mineral Report

Dunn, McKown, Miller, and others participated in the field examination that occurred on October 24 and 25, 2000. Mineral Report at 20. During this field work, the exposed deposit at the pit was measured, discovery points identified by Miller, McKown, or his partner were investigated and sampled, and the claims were walked to search for other discovery points (e.g., quartz outcrops and indications of a quartz outcrop), with additional samples being taken for comparison and analysis. *Id.* at 21. A second site visit was made in late May 2001 to locate remaining claim corners, map

the remainder of the claims' geology, and dig pits to determine if there was a continuation of "quartz down the slope" from exposed deposit in the pit. *Id.* at 22. The Mineral Examiners dug 14 pits to bedrock, which is grandiorite (not quartz), again traversed the claims in an unsuccessful search for additional quartz outcrops, and took samples for comparison and analysis. *Id.*

While awaiting further Forest Service action, McKown retained David Brown and Associates to evaluate the exposed deposit on his claims. At Miller's request, Dunn and other Forest Service personnel were present to answer questions when David E. Brown, Registered Geologist, and his assistant did their field work on May 23, 2002. Mineral Report at 22; *see* Ex. 12. Brown submitted a preliminary evaluation to Miller on June 26, 2002, which noted the deposit may be a "massive, pervasive bull quartz vein" and recommended test drilling to identify more accurately its volume, suggesting that Forest Service approval to drill be sought "as soon as possible." Ex. 15 at 1; *see also* Ex. 14.⁶

The Mineral Report was completed by Dunn on May 5, 2006, and approved by Forest Service management on March 5, 2007. It reviews the geology, the history of mining in the area, and prior development at the site and estimates that the deposit contains 18,986 tons of silica. *Id.* at 12-20, 28-30. The report discusses the field work performed and the analytical results from samples taken and concludes:

Based on the results of the field examination and sampling on the claims, the White Cap #2 and #3 did not have any significant quartz resources and were eliminated from further consideration. The White Cap #1 has a milky white quartz outcrop in the center of the claim, and we evaluated the economics and marketability of this quartz.

Id. at 2; *see id.* at 20-28.

The Mineral Report analyzed potential markets for silica from this claim but determined that its only potentially viable market then and at the time of withdrawal was for manufacturing flatglass and/or fiberglass. *Id.* at 31-43. The Forest Service team considered a process developed by Michel to purify silica for sale in high-end markets but concluded that process had yet to be demonstrated as commercially

⁶ No request to perform test drilling was made by McKown until 7 years later and more than two years after a contest hearing was first scheduled. *See* Motion for Taking of Core Sample at Contestee's Claims, Dec. 29, 2009. ALJ Heffernan denied that motion because McKown had failed adequately to specify where his core drilling would occur. *See* Order dated Jan. 7, 2010, Contestee's Motion for Taking Core Sample Denied.

viable⁷ and would not be an integral part of mining McKown's claims. *Id.* at 37. Since he failed to provide information on mining and processing his claims after being requested to do so, the mineral examination team "determined what we thought would be the most reasonable methods of mining and processing." *Id.* at 43; *see id.* at 43-46. Using that scenario, the report identified and quantified the operating, capital, reclamation, and other costs for mining 18,986 tons of quartz on the claims in 1994 and at the time of the validity examination. *Id.* at 46-58. It determined that total mining costs in 2005 were \$41.71/ton and would have been between \$31.09 and 33.38/ton in 1994 and that the then average price of silica sand for flatglass or fiberglass manufacture was between \$14.82 and \$20.04/ton. *Id.* at 61, 62 (Tables 14, 15, 16).⁸ The report therefore concluded: "After a comprehensive analysis of the potential markets, we determined that due to the limited size, chemical composition, and distance from potential markets, there are no locatable minerals of sufficient quality and quantity exposed within the subject claims to constitute a discovery of a valuable mineral deposit." *Id.* at 2.

The Decision on Appeal

A contest complaint was initiated and assigned to ALJ Heffernan. McKown answered the complaint and initiated lawsuits based on that complaint in both the Federal Court of Claims and the U.S. District Court for the Eastern District of California. This contest was initially stayed by ALJ Heffernan, but he lifted his stay after the Court of Claims granted a stay. *See* Order dated Nov. 3, 2009, Motion to Lift Stay and Schedule Hearing Granted; *see also* Order dated Jan. 7, 2010, at 5, Contestee's Motion for Taking Core Sample Denied. A hearing was then scheduled and held in Bakersfield, California. Following that hearing and post-hearing briefing,

⁷ McKown and Michel provided only a general description of the Michel process to the mineral examiners because they were unwilling (or unable) to enter into a confidentiality agreement protecting Michel's research and the details of his process that was then in the patenting process. Mineral Report at 36; Tr. 194. Dunn testified that he learned from Michel that he was "working on a way of purifying the silica [for] higher-end uses" (e.g., in the manufacture of silicon metal and synthetic quartz crystals) and that he was doing his research at a leased facility. Tr. 194, 195; *see id.* at 193. Dunn then understood the Michel process "was in the test and research stage" to determine whether it "could be used to make synthetic crystals or silicon metal." *Id.*; *see* Mineral Report at 35-37.

⁸ The Mineral Report notes its cost estimates do not include crushing this mineral material into sand or hauling that sand to market. *Id.* at 63. It also notes this silica sand could compete in the fiber cement siding market but that prices in that market are within the above-identified range. These estimates were later updated for the contest hearing. *See* Supplemental Mineral Report, Dec. 7, 2009, Ex. 37.

ALJ Heffernan decided this matter by order dated May 25, 2009. Ex. A (Decision).

ALJ Heffernan comprehensively reviewed and summarized the evidence presented.⁹ His summary of the Government's case-in-chief states:

- Exposure and discovery points on White Cap Nos. 2 and 3. Tracy Parker, a geologist who assisted in the validity examination and in preparing the Mineral Report, evaluated both discovery points identified by McKown (*i.e.*, the pit also located on White Cap No. 1 and an area McKown claimed was an extension of the quartz vein from the pit on White Cap No. 1), and except for that pit, observed no significant exposure of quartz material or an exposure of any other locatable mineral on White Cap No. 3. Decision at 4 (citing Tr. 95-96, 99, 100). Dunn made similar observations, stating there were only small amounts of in-place quartz on that claim and opining that this quartz was not geologically related to the quartz in the pit on White Cap No. 1. Decision at 7 (citing Tr. 165, 166). Both Parker and Dunn concluded that White Cap No. 3 is not mineral in character. Decision at 4, 8 (citing Tr. 99, 167). Dunn also stated there were no exposures of in-place quartz or any other locatable mineral on White Cap No. 2, concluding that it was not mineral in character. Decision at 7, 8 (citing Tr. 163, 167).
- Exposure and discovery points on White Cap No. 1. Dunn opined that the deposit exposed in the pit was “not a vein extending all the way down” and stated that neither he nor McKown observed or identified any other exposures on White Cap No. 1. Decision at 7, 8 (quoting Tr. 160, citing Tr. 161, 178). Based on geologic inference, observations, and surface measurements, Dunn determined this deposit contained 18,980 tons of quartz, but recognized that the U.S. Geologic Survey and Michel estimated that it contained 22,000 and 37,000 tons, respectively. Decision at 8 (citing Tr. 176, 177).
- Potential markets for the quality and quantity of quartz in the exposed deposit. Based on analytical and testing results of samples taken from White Cap No. 1, Dunn stated it was of sufficient quality to be used in manufacturing flat glass, container glass, fiberglass, fiber cement board,¹⁰ and lower grade silicon

⁹ We have reviewed the record and find ALJ Heffernan's summary to be a fair and accurate representation of the evidence presented at the January 2010 hearing. Based on that review, we focus on that summary and its citations to the record for simplicity and convenience.

¹⁰ Parker testified there was no market for this quartz as an ingredient in manufacturing fiber board when these lands were withdrawn on Oct. 31, 1994.

(continued...)

metal ¹¹ but that this deposit was of insufficient quantity for the flat glass or container glass markets (both at the time of withdrawal and hearing) because those glass producers require at least 40,000 tons of silica per year. Decision at 8, 9, 10 (citing Tr. 190, 191, 216, 218-19). Parker stated this deposit was also of insufficient quantity for use by the fiberglass industry (producers required in 1994 and were requiring at the time of the hearing more than 70,000 tons per year of silica). Decision at 5 (citing Tr. 110, 112). He further stated that while this quartz was of sufficient quality and quantity for use by silicon metal smelters in the east (there were no smelters in the west at the time of withdrawal or the hearing), its transportation costs (\$80 per ton) would exceed the price those smelters would pay for that quartz (less than \$20 per ton). Decision at 5 (citing Tr. 104-05, 107-09).

- The Michel process. Dunn stated that the proprietary Michel process was not tied exclusively to quartz or this deposit, not an established technology, and still in a testing and research mode at the time of withdrawal and his mineral examination. Decision at 9 (citing Tr. 195, 213-15). He was unaware whether any company was actually using that process or if it had become an established technology after his examination. *Id.*
- Estimated costs and anticipated revenues. Dunn outlined the methodology used to estimate that the average cost of mining the White Cap No. 1 deposit on the date of withdrawal and hearing was \$48 per ton, but that anticipated revenues were less than \$18 per ton. Decision at 10-11 (citing Tr. 223-29, 231, 244); *see also* Decision at 6 (citing Mineral Report, Attach. 11 (Mel Adams' 2001 bid to mine the claims for McKown), Attach. 12 (2006 mining cost calculations by Dunn)).

ALJ Heffernan next summarized McKown's case-in-chief. McKown stated that Adams is a "big operator" and fully qualified to execute his bid to mine the claims.¹²

¹⁰ (...continued)

Decision at 5 (citing Tr. 113).

¹¹ Dunn also testified that this quartz could not be used in the ground silica by-products market as a paint additive (failed the brightness test) or to produce synthetic quartz crystals (insufficient purity). Decision at 9, 10 (citing Tr. 212, 220, 221-22).

¹² Adams' bid to mine, haul, and crush this quartz was only six lines long, but he explained: "We have been doing this for many years, and know what it costs to mine. If it costs us more than what we bid to produce, we lose, not [McKown]."

(continued...)

Decision at 11 (citing Tr. 293-94, 298-99). McKown also stated the Michel process could process the silica in this deposit to a purity of 99.9999%, which could then be sold for \$40,000 per ton, and that Michael Jones, the President of BGM Enterprises and a director of Core Financial, LLC (companies that fund development projects), was interested in purchasing his claims for \$33.2 million. Decision at 12 (citing Tr. 304-07). Jones testified that he visited the claims in 2004, was familiar with Dr. Michel and his purification process, believed that process would yield a value for purified silica of \$59,000/ton, and offered to purchase the claims for \$22 million, which he later increased to \$33 million after he had samples analyzed. *See id.* at 13-14 (citing Tr. 368, 372-75, 387, 390-91). Although he did not complete that purchase, allegedly because the Forest Service had prevented drilling on them, Jones represented he was still interested, had the financial resources, and would purchase them if allowed to do so. Decision at 12, 13 (citing Tr. 378, 382-83, 397).

In rebuttal, the Government recalled Dunn, who opined that Adams' 2001 proposal and 2008 affidavit suggested an economic loss to him. Decision at 15 (citing Tr. 434-36); *see* Affidavit of Mel Adams dated May 1, 2008, Ex. C. Dunn also stated that he had advised McKown in 2002 that he could do core drilling on the claims if he updated his 2000 Plan of Operations or submitted a new plan to the Forest Service that was adequately specific for core drilling. Decision at 15 (citing Tr. 437-38).

McKown recalled Jones for his rebuttal. He testified that his offer to purchase McKown's claims was based on using the Michel process, which would purify the silica to a purity of 99.9999% and command substantially higher prices than were assumed by the Government. Decision at 16-17 (citing Tr. 460-61).

After summarizing the evidence, ALJ Heffernan concluded: "On balance, the weight of the evidence adduced at the hearing supports the government's contentions with respect to the invalidity of all three of the White Cap Claims." Decision at 17; *see id.* at 19 ("Contestee and his representatives never provided the government examiners with any additional viable sampling sites on any of the claims, other than the exposed pit area on White Cap Claim 1"). In considering Jones' testimony and offer to purchase McKown's claims, ALJ Heffernan ruled his offer "does not, by itself, establish a valuable discovery, because mineralization and its related marketability must be established independently of any offer to purchase," noting that offer was "specifically dependent upon an application of the Dr. Michel process after extraction," and it "was not accompanied by evidence to confirm that the quartz was independently marketable and profitable." *Id.* at 19; *see also id.* ("No viable evidence

¹² (...continued)

Mining Report, Attach. 12; *see* Mining Report, Attach. 11.

was presented by Contestee with respect to the additional cost of the Michel process.”).

ALJ Heffernan rejected McKown’s claim that he was denied an opportunity to drill on his claims and obtain core samples to prove their validity, finding he “never filed the necessary written proposal” and that his correspondence with the Forest Service “reflects only an unspecified future intention to do core drilling, which was never brought to fruition.” Decision at 19. McKown’s reliance on Adam’s earlier bid to mine the deposit was also rejected by ALJ Heffernan because it had not been “updated to reflect contemporary costs” and failed to include Adams’ labor costs. *Id.* at 20 (citing *United States v. Gardener*, 18 IBLA 175, 179 (1974)).

ALJ Heffernan concluded that each claim is “invalid for lack of a valuable discovery” and declared them “null and void.” Decision at 20. McKown timely appealed from that decision.

Discussion

The law applicable to the validity of a mining claim is well established:

To be valid, a mining claim must contain, within its boundaries, a “valuable mineral deposit.” *United States v. Collord*, 128 IBLA 266, 268 (1994). The “prudent man” test determines whether a discovery of a valuable mineral deposit has been made. A discovery has been made when “minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a paying mine.” *United States v. Coleman*, 390 U.S. 599[, 608] (1968). Assumptions regarding a prudent person are based on objective standards related to the nature of the mineral deposit disclosed on the claim, and not on the attributes or circumstances of the claimant. A mining claimant must show, as an objective matter and “as a present fact, considering historic price and cost factors and assuming that they will continue, there is a reasonable likelihood of success that a paying mine can be developed.” *In re Pacific Coast Molybdenum Co.*, 75 IBLA 16, 29, 90 I.D. 352, 360 (1983).

The test of discovery has been considered to include a “marketability test.” The Supreme Court adopted this refinement of the rules regarding discovery in *United States v. Coleman*, 390 U.S. at 602-03, declaring that the discovery of a valuable mineral deposit requires a showing that the deposit is ultimately marketable at a profit.

As the Court stated, the “prudent-man test and the marketability test are not distinct standards, but are complementary in that the latter is a refinement of the former.” *Id.* at 603. Board decisions have squared *Coleman’s* profitability test with the requirement of a “reasonable prospect of success” adopted by the Supreme Court in *Chrisman v. Miller*, 197 U.S. 313, 322 (1905). Discovery thus requires a showing of a reasonable prospect that the deposit can be mined, removed, and marketed at a profit. Evidence of a claimant’s willingness to develop a claim does not establish the existence of a discovery. Even when a claimant is actually mining a claim at a small profit, a finding of no discovery will be justified because “a prudent man would not develop a mine which promised a profit below the return for a commercial venture.” *United States v. Kottinger*, 14 IBLA 10, 16 (1973).

The date of segregation or withdrawal of public lands from mineral entry is critical because a mining claimant acquires rights which cannot be cancelled by the segregation if the claim has been perfected, including discovery, on the date of the segregation or withdrawal. Once a discovery has been made, it must be maintained until a patent application has been perfected and equitable title has vested. Accordingly, a discovery must exist and present marketability must be shown as of the date of the segregation and as of the date of the hearing, and no further exploration to physically expose valuable mineral of sufficient quality and quantity to constitute a discovery can be permitted after the date of segregation.

The exposure within the claim of a mineral deposit containing mineral values worth exploiting is a necessary precondition to the discovery of a valuable mineral deposit. The deposit must be physically exposed as of the date of segregation, and the discovery must be based upon showings of mineral value from the mineral deposit that was exposed prior to the segregation date. Sample data collected after the segregation may be used to establish the existence of a valuable mineral deposit as of the date of segregation, bearing in mind that there is a distinction between discovery of a valuable mineral deposit and sampling to verify the value of the deposit. It is the date of the exposure of the mineral source, not the date of sampling, that controls.

When the Government contests the validity of a mining claim, it bears only the burden of going forward with sufficient evidence to establish a *prima facie* case. Whether the Government has presented a *prima facie* case is necessarily limited to the evidence presented by the

Government in its case-in-chief. A prima facie case is made when, on the basis of probative evidence of the character, quality, and extent of the mineralization, a Government mineral examiner offers his expert opinion that a discovery of a valuable mineral deposit has not been made within the boundaries of a contested claim. Once a prima facie case is presented, the burden shifts to the claimant to overcome the Government's showing by a preponderance of the evidence, but only with respect to those issues for which the Government has established a prima facie case.

United States v. Pass Minerals, Inc., 168 IBLA 115, 121-23 (2006) (*Pass Minerals*) (additional citations omitted); see *United States v. Dwyer*, 175 IBLA 100, 112 (2008), and cases cited.

McKown contends the Government failed to establish a prima facie case of claim invalidity and that the Forest Service denied him motorized access to his claims and prevented him from taking core samples. SOR at 5-9. McKown further contends ALJ Heffernan erred in weighing the evidence concerning the Michel process, his mining costs (*i.e.*, Adams' bid to mine the claims), and Jones' offer to purchase his claims or the quartz (silica) underlying them. *Id.* at 9-11; see *id.* at 3-4; Reply at 4 ("If Jones wanted to buy [McKown]'s quartz, utilize Dr. Michel's process, and store the end product, the Government has shown no authority that it has the right to ask where a buyer is going to resell his product.").¹³

The Government responds that it established a prima facie case by showing there was no exposure of a lode or vein on White Cap Nos. 2 and 3 and that the long-exposed deposit in the pit on White Cap No. 1 (*i.e.*, the Great White Way prospect) was of insufficient quality and quantity to support developing a paying mine. Answer at 45-62. The Government denies it prevented McKown from accessing and drilling his claims to obtain core samples. *Id.* at 66-68. It avers that ALJ Heffernan properly weighed the evidence in determining that these claims are invalid. As to the Michel

¹³ McKown suggests that the Board remand this matter for an evidentiary hearing and allow him to take core samples to help "defeat all or part of the Contest [Complaint]." SOR at 9. However, he has not articulated an equitable basis for doing so or demonstrated that if we followed his suggestion, a different outcome could be achieved (*i.e.*, a finding that he discovered a valuable mineral deposit on his claims). Nor has he justified his failure to present evidence at the hearing before ALJ Heffernan on the details of the Michel process or Jones' finances or explained his unwillingness to request permission from the Forest Service to drill his claim and take core samples. We need consider his suggestions no further. See *Pass Minerals*, 168 IBLA at 158, and cases cited.

process, the Government contends the record shows that process did not exist on the date of withdrawal, was still in development at the time of the hearing, and had yet to be “used to produce industrial silica in any industrial silica market.” *Id.* at 57; *see id.* at 31-32, 34-35, 53, 64-65, 71-73; *see also id.* at 79 (“the Michel process, much like the philosopher’s stone, is mythic”). The Government maintains that its cost estimates are “consistent with standard mining industry practice” and therefore superior to and more credible than Adams’ bid. *Id.* at 55; *see id.* at 54-56, 69-71. The Government claims that Jones’ offers to purchase the claims or their quartz (silica) are irrelevant in determining whether a paying mine can presently be developed or could have been developed when these lands were withdrawn from mineral entry. *Id.* at 64-65, 74-75.

We separately address each of the above-described issues in the order presented.

I. The Government established a prima facie case.

McKown contends the Government failed to establish a prima facie case that his claims are not valid. SOR at 5-7; Reply at 4. In determining whether the Government’s case-in-chief established a prima facie case,

[t]he question is whether the testimony of the Government’s witnesses, if standing by itself, unchallenged and unrefuted, would warrant the conclusion that there had been no discovery of a valuable mineral deposit on any of the claims in question. How that testimony looks in the light of the testimony of expert witnesses for the opposing party relates solely to the question of whether the contestee has demonstrated a discovery by a preponderance of the evidence. *Cf.*, *Foster v. Seaton*, 271 F.2d 836 (D.C. Cir. 1959).

United States v. Larsen, 9 IBLA 247, 256 (1973); *accord United States v. Newman*, 178 IBLA 175, 182 (2009); *United States v. Martinek*, 166 IBLA 347, 405 (2005). For a lode mining claim to be valid, “a vein or other mineralized ore body must be exposed” on that claim. *United States v. Newman*, 178 IBLA at 183, and cases cited; *see Pass Minerals*, 168 IBLA at 122 (“exposure within the claim of a mineral deposit containing mineral values worth exploiting is a necessary precondition to the discovery of a valuable mineral deposit”).¹⁴ Thus, the Government establishes a

¹⁴ If a vein or lode is exposed, the claimant may use geologic inference to quantify that deposit. *See United States v. Newman*, 178 IBLA at 183; *United States v. Clouser*, 144 IBLA 110, 115 (1998) (geologic inference “permits the dimensions of a mineral
(continued...)”)

prima facie case of claim invalidity by showing that no exposure of a vein or lode exists on the claim or if a deposit is exposed, that it is of insufficient quantity or quality to show that a prudent person would expend the effort necessary to develop that deposit into a paying mine with a reasonable prospect for success (*i.e.*, the mineral deposit can be mined, removed, and marketed at a profit). *See Pass Minerals*, 168 IBLA at 121-22; *see also United States v. Bagwell*, 143 IBLA 375, 392-93 (1998) (“evidence of mineralization which may justify further exploration, but not development of a mine, does not establish the discovery of a valuable mineral deposit”); *United States v. Whitney*, 51 IBLA 73, 85 (1980).

[1] The Government presented the testimony of its mineral examiners and introduced their Mineral Report during its case-in-chief showing that they investigated discovery points identified by the claimant, searched for exposed mineralization on White Cap Nos. 2 and 3, but found no such exposure on either of them. The Government therefore established a prima facie case that White Cap Nos. 2 and 3 are not valid claims based on the testimony of its mineral examiners. *See United States v. Newman*, 178 IBLA at 181-82, 183-84, and cases cited. As to White Cap No. 1, which has an exposed deposit that was earlier identified as the Great White Way prospect, the Government’s case-in-chief showed that this quartz (silica) deposit was of insufficient quality and quantity to constitute the discovery of a valuable mineral deposit (*i.e.*, the cost to mine, haul, and process its quartz (silica) would exceed the price it could command in the marketplace on both the date of withdrawal and the date of the contest hearing). We therefore conclude the Government established a prima facie case that White Cap No. 1 is not a valid mining claim. *See United States v. Newman*, 178 IBLA at 181-82.

II. *Motorized access is not probative in determining claim validity.*

McKown claims he had a right to access his claims by motorized vehicle via a historic, public road but was denied such access by the Forest Service. SOR at 7-8; Reply at 2. But even if such a right exists, it is clear from the record that the Forest Service did not prevent him from accessing his claims. Motorized access would have made it more convenient for McKown to visit his claims, but lack of such access did not prevent him from accessing them. *See Clouser v. Espy*, 42 F.3d 1522, 1535-36 (9th Cir. 1994), *cert. denied*, 515 U.S. 1141 (1995); *Public Lands for the People, Inc., v. United States Dept. of Agriculture*, 2010 WL 5200944, at *7-8 (E.D.Cal. 2010). Nor did the Forest Service preclude him from using motorized or other heavy equipment on his claims (*e.g.*, a drill rig for taking core samples), it simply required him to

¹⁴ (...continued)

deposit to be defined by extrapolating, in accordance with sound geologic principles, from surface and underground exposures of the deposit”).

submit a plan of operations and obtain Forest Service approval before such use and access occurred. As noted by ALJ Heffernan, the record confirms that McKown “never filed the necessary written proposal” to do core drilling and that the Forest Service had, in fact, allowed him “to utilize motorized vehicles and contemporary equipment to access the claims and to collect samples.” Decision at 19. Any actual or perceived limitation on motorized access after these lands were withdrawn from mineral entry simply is not relevant in determining whether these claims were then and currently are valid.

III. McKown did not submit a plan of operations to drill and take core samples and only belatedly requested that he be allowed to do so.

McKown asserts that the Forest Service repeatedly prevented him from taking core samples and impliedly claims ALJ Heffernan erred in denying his motion to take core samples. SOR at 8-9; Reply at 2. The record shows otherwise.

[2] Michel’s October 1994 report noted that the deposit could be significantly larger than the 36,450 tons he estimated because its depth and lateral extent had not been delineated by core drilling. McKown’s retained geologist echoed that view, recommending in June 2002 that McKown seek Forest Service approval to drill and take core samples as soon as possible. Even after this contest was initiated and a hearing scheduled for September 2008, McKown still failed to act. It was not until December 2009 that he pursued this issue, not by filing a plan of operations to drill and take core samples with the Forest Service, but by filing a motion with ALJ Heffernan. Noting a lack of specificity on where McKown’s proposed core drilling would occur, ALJ Heffernan denied that motion. Order dated Jan. 7, 2010, at 2-3.¹⁵ McKown raised this issue again after the hearing by urging ALJ Heffernan to defer deciding this matter until he could take core samples. Contestee’s Responding Brief

¹⁵ ALJ Heffernan was appropriately concerned that, by failing to specify where his core drilling would occur, McKown could engage in exploratory work to prove his claims, rather than confirm the extent of his discovery. Order dated Jan. 7, 2010, at 2-3; *see Pass Minerals*, 168 IBLA at 122 (“no further exploration to physically expose valuable minerals of sufficient quality and quantity to constitute a discovery can be permitted after the date of segregation”). Moreover, ALJ Heffernan concluded by noting that if McKown’s motion were granted, the January hearing would be rescheduled and could result in a violation of the Court of Claims’ mandate (or expectation) for a prompt disposition when it stayed McKown’s then-pending lawsuit before that court. Order dated Jan. 7, 2010, at 5; *see also* Order dated Nov. 3, 2009.

at 4, May 9, 2010. ALJ Heffernan was unpersuaded and proceeded to decide this mining contest.¹⁶ See Decision at 19.

McKown failed to act for over 15 years, acting only on December 28, 2009, shortly before witness and exhibit lists were to be exchanged and only three weeks before the contest hearing was scheduled to begin. We affirmed the Forest Service refusal to allow core drilling in *United States v. Crowley*, 124 IBLA 374, 378 (1992), where we held:

Once land has been withdrawn from mineral entry, drilling may only be permitted where it constitutes an effort to confirm the pre-existing discovery of a valuable mineral deposit. See *United States v. Mavros*, 122 IBLA 297, 310-11 (1992). At the very least, there must be a showing that there has been an exposure of valuable minerals before permission may be granted to determine the extent thereof.

See also *Ernest K. Lehman & Associates of Montana, Inc. v. Salazar*, 602 F. Supp.2d 146, 164 (D.D.C. 2009), *aff'd* 377 Fed.Appx. 28 (D.C. Cir. 2010). Under the circumstances here presented, we find no error in ALJ Heffernan denying McKown's belated request to take core samples and agree with the Government that "appellant has only himself to blame for his failure to take core drill samples." Answer at 81.

IV. *ALJ Heffernan did not err in his considering the evidence presented and determining that these claims are invalid for lack of a discovery.*

Since we have concluded that the Government established a prima facie case that White Cap Nos. 2 and 3 are invalid because there had been no exposure of a lode or vein on either claim, the burden was then on McKown to show that a lode or vein had been exposed on these claims. See *Pass Minerals*, 168 IBLA at 123 (exposed mineralization is "a necessary precondition to the discovery of a valuable mineral deposit"). McKown failed to identify a valid discovery point on these claims, and while he asserted they contain an extension of the deposit exposed on White Cap No. 1, his assertion is not the same as or a substitute for an exposure. See *United States v. Bagwell*, 143 IBLA at 392-93. Because we find McKown did not proffer any probative evidence showing that he had exposed a lode or vein on White Cap No. 2 or No. 3, we conclude he did not meet his burden and therefore affirm ALJ Heffernan's ruling that both these claim are invalid.

¹⁶ Even if ALJ Heffernan had allowed the taking of core samples to better define the size of the exposed deposit on White Cap No. 1, it would have been for naught as McKown proffered no probative evidence that any amount of quartz (silica), much less a larger amount, could be profitably mined from that claim. See *infra* discussion.

We have also concluded that the Government met its burden to establish a prima facie case as to White Cap No. 1 by showing the deposit exposed in the pit on that claim was of insufficient quality and quantity to support the development of a paying mine on the date of withdrawal and the hearing. Thus, the burden shifted to McKown to show, by a preponderance of the evidence, that the quartz (silica) on this claim could be mined at a profit on both those dates. *See Pass Minerals*, 168 IBLA at 122 (“a discovery must exist and present marketability must be shown as of the date of the segregation [withdrawal] and as of the date of the hearing”).

McKown contends he met his burden by allegedly showing that the Michel process could purify his deposit’s silica, which could then be sold in high-end markets for thousands of dollars per ton, and that Jones’ offer to purchase his claims or the quartz (silica) underlying them further demonstrates his discovery of a valuable mineral deposit. SOR at 4-5, 11. McKown also contends he preponderated on his mining cost based on Adam’s bid to mine his claims at a fixed price of \$27 per ton, whereas the mineral examiners’ estimates were \$48.96 per ton at the time of the contest hearing and \$31.09 per ton on October 31, 1994, the date of withdrawal. SOR at 3-4, 9-11; *see Mineral Report* at 61; *Supplemental Mineral Report* at 5.

The Government responds by asserting that ALJ Heffernan properly weighed the evidence and determined these claims are invalid. As to the Michel process, the linchpin to McKown’s claim that he could sell processed silica from his deposit in high-end markets for thousands of dollars per ton, the Government points out that the Michel process did not exist on the withdrawal date, was still in the experimental stage at the time of the hearing, and had yet to be used in or for any identified market. Answer at 31, 34-35, 54-57, 73-74, 78.¹⁷ It also points out that McKown failed to show his claim’s silica could be processed and sold at profit because he provided no cost data on the processing costs for using the Michel process. Regarding Jones’ offers, the Government emphasizes that Jones is a “promoter” and does not intend to mine these claims (only to resell them) and then argues that these

¹⁷ The Government also argues that the Michel process is irrelevant to claim validity, characterizing it as an independent treatment process that adds value to the deposit’s quartz (silica) and asserting that this process is not integral to the mining of that quartz. Answer at 72-73. The mineral examiners determined this quartz was locatable because of its silica content (95.5% pure silica) and marketability after processing (*e.g.*, after it is ground to a sand-like consistency). *See Mineral Report* at 38-39, 42-44. Without further detail concerning the Michel process, it is not possible for this Board to determine whether it is an acceptable form of mineral processing or more properly categorized as a separate, post-mining treatment step. In any event, ALJ Heffernan did not decide that issue, and we need not resolve it here. *See Decision* at 19; *infra* discussion.

offers do not show a paying mine could presently be developed or could have been developed when these lands were withdrawn from mineral entry. *Id.* at 64-65, 74-75. With respect to McKown's reliance on Adams' bid as establishing his mining costs, the Government asserts that its detailed cost estimates to mine the claims in 2009 and 1994 are more relevant than and superior to Adams' circa 2000 bid and that ALJ Heffernan properly relied on those estimates. *Id.* at 69-71, 78.

[3] Since these disputed factual issues over the Michel process, Jones' bids and the cost to mine these claims all arise in the context of an appeal after an evidentiary hearing, we are guided by our decision in *United States v. Multiple Use, Inc.*, 120 IBLA 63 (1991), a case that also involved a contest hearing. We there observed and held:

This is an appeal from a decision by an Administrative Law Judge after a hearing in which evidence was presented. This evidence took the form of testimony under oath and documentary evidence. Following the hearing the parties submitted written arguments which were considered by the Judge. After weighing the evidence presented by the parties and the arguments of fact and law offered by each, a written decision was issued setting forth the findings of fact and conclusions of law. In such cases, the appealing party has the burden of showing error in the Administrative Law Judge's decision. In such cases, this Board has had a long-standing reluctance to overturn the Administrative Law Judge's determinations, as he presided at the hearing, witnessed the deportment and demeanor of the witnesses, and is in the best position to weigh the credibility of the various witnesses. This is especially true when the record contains testimony that could be construed as conflicting or contradictory when taken out of the context of the hearing, or when the resolution of disputed facts is influenced by the Judge's findings of credibility of a witness or the relative weight assigned by him to testimony that might otherwise be construed as conflicting. On appeal an appellant must show adequate reason for appeal with some particularity, and support the allegations with arguments or appropriate evidence showing error. An appellant who fails to do so cannot be afforded favorable consideration. Conclusory allegations of error, standing alone, do not suffice.

120 IBLA at 76 (citations omitted). In this case, ALJ Heffernan comprehensively summarized the evidence and determined, "[o]n balance, the weight of the evidence adduced at the hearing supports the government's contentions with respect to the invalidity of all three of the White Cap Claims." Decision at 17; *see id.* at 2-17. We have reviewed the record against the arguments here raised by McKown and

conclude that he has not shown error in ALJ Heffernan's consideration of the evidence presented and determination that these claims are invalid.

The Government's case-in-chief showed that the Michel process did not exist on the withdrawal date and was still in the testing and research phase at the time of the hearing before ALJ Heffernan. McKown responded with the testimony of fact witnesses who stated this process can purify his claims' silica (quartz) for sale in high-end markets for more than \$40,000 per ton and hearsay testimony that the Michel process was then being used. However, he provided no cost or supporting data on the current use of that process or any evidence the Michel process even arguably existed on the date of withdrawal. *See* Decision at 19. The Michel process may be a valuable technology, but unsupported assertions and hearsay testimony are insufficient to preponderate and show that this process had advanced beyond the testing stage at the time of the contest hearing or could be used to process and sell his claims' silica (quartz) at a profit. It was McKown's burden to show he discovered a valuable mineral deposit on both the date of withdrawal and the hearing. Our review of the evidence presented on the Michel process shows that McKown did not meet his burden on either date. We therefore reject his argument that ALJ Heffernan erred in considering either his evidence or the Michel process. *Cf.*, *United States v. Freeman*, 179 IBLA 341, 350 (2010).

McKown contends that Jones' offers to purchase his claims or the quartz (silica) underlying them further demonstrates his discovery of a valuable mineral deposit. SOR at 11-12; Reply at 3-4. Jones explained that he made these offers based on his belief that the Michel process could purify this deposit's silica and that he could then resell the claims or purify that silica and sell it a substantial profit. *See* Tr. 372, 377-78, 382-93, 460-67. ALJ Heffernan considered that testimony but found:

The testimony by Mr. Jones that he offered to purchase the claims does not, by itself, establish a valuable discovery, because mineralization and its related marketability must be established independently of any offer to purchase. Mr. Jones' offer to purchase was not accompanied by evidence to confirm that the quartz was independently marketable and profitable. Indeed, Mr. Jones' offer was specifically dependent upon an application of the Dr. Michel process after extraction of the quartz. As the testimony of Mr. Dunn confirmed, the Dr. Michel process was an experimental process, which was intended to enhance the value of the quartz.

Decision at 19. We find no error in that discussion or ALJ Heffernan's consideration of Jones' testimony with respect to his offer to purchase the claims. Nor do we find

that his testimony constitutes objective evidence showing that McKown discovered a valuable mineral deposit on his claims.

[4] Jones' belief that he can resell the claims or purchase their quartz, use the Michel process, and then sell purified silica for tens of thousands of dollars per ton does not, without considerably more having been shown, demonstrate that a paying mine would be developed by a person of ordinary prudence. See *United States v. Coleman*, 390 U.S. 599, 602-03 (1967). At most, it shows he believe he can realize a profit by reselling the claims. Nor does his offer to purchase in-ground silica from McKown show it can be processed and sold at a profit, as could conceivably be shown by the testimony of a silica processor, wholesaler, or purchaser of processed silica. Regardless of Jones' subjective beliefs, the standard for determining the validity of a mining claim is an objective one:

A discovery has been made when “minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a paying mine.” *United States v. Coleman*, 390 U.S. 599 (1968). Assumptions regarding a prudent person are based on objective standards related to the nature of the mineral deposit disclosed on the claim, and not on the attributes or circumstances of the claimant. A mining claimant must show, as an objective matter and “as a present fact, considering historic price and cost factors and assuming that they will continue, there is a reasonable likelihood of success that a paying mine can be developed. *In re Pacific Coast Molybdenum Co.*, 75 IBLA 16, 29, 90 I.D. 352, 360 (1983).

Pass Minerals, 168 IBLA at 121. Jones was not proffered as an expert, and his testimony as to why he made his offers was as a fact witness and not the opinion of duly qualified expert (e.g., an experienced mineral processor, silica wholesaler, or purchaser of processed silica).¹⁸ His offers simply do not constitute objective proof that a paying mine can or could have been developed on McKown's claims.¹⁹ McKown's reliance on Jones' offers is unavailing to show error in ALJ Heffernan's

¹⁸ The record shows Jones had long ago worked in a mine as a laborer, but it fails to indicate that he has any expertise in mining or mineral processing. See Tr. at 375-76.

¹⁹ Since Jones did not make his offers until long after these lands were withdrawn in 1994 (i.e., he first sought to purchase these claims in 2001 and only later expressed an interest in purchasing their quartz (silica)), they are irrelevant on the issue of whether McKown has shown that he discovered a valuable mineral deposit on the date of withdrawal, particularly since there is no evidence showing that the Michel process that was relied on by Jones in making his offers then existed.

decision. *See* Decision at 19; *United States v. Kaycee Bentonite Corp.*, 64 IBLA 183, 221-22, 89 I.D. 262, 282-83 (1982).

McKown also contends he preponderated in establishing his mining costs based on Adams' bid to mine the claims for a fixed price of \$27/ton. SOR at 10-11; Reply at 2; *see* Ex. C. Adams presented his bid to McKown sometime after he visited the claims in 1997 but before McKown submitted his Plan of Operations to the Forest Service in early 2000. *See* Affidavit of Mel Adams at ¶¶ 3-7, Ex. C. However, Adams was unavailable to testify on what his bid-price would be at the time of the hearing or would have been on the date of withdrawal, the key dates for determining claim validity. We are unpersuaded that ALJ Heffernan erred in relying on the Government's detailed cost estimates or finding that Adams' bid was "insufficient to meet the Contestee's burden of proof." Decision at 20; *see id.* at 10-11, 15, 20; *see also* Mineral Report at 46-61; Supplemental Mineral Report at 2-6.

In sum, we find no error in ALJ Heffernan's considering the evidence presented and therefore conclude that he properly ruled that McKown had not shown that he discovered a valuable mineral deposit on White Cap Nos. 1, 2, or 3, on both the date of withdrawal and the time of the contest hearing.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the May 25, 2010, decision by Administrative Law Judge Heffernan is affirmed.

_____/s/
James K. Jackson
Administrative Judge

I concur:

_____/s/
Christina S. Kalavritinos
Administrative Judge