

Editor's note: Reconsideration denied by order dated Aug. 24, 1971; Appealed – aff'd, Civ. No. 71-684 (D. Oreg. Aug. 23, 1972), 347 F.Supp. 501, aff'd, No. 72-2839 (9th Cir. Dec. 19, 1973)

UNITED STATES
v.
MAURICE DUVAL, ET AL.

IBLA 70-18 Decided November 23, 1970

Mining Claims: Common Varieties of Minerals – Mining Claims:
Determination of Validity – Mining Claims: Discovery

Even if deposits of sand suitable for use in glass manufacturing may be considered uncommon varieties within the meaning of the act of July 23, 1955, and locatable thereafter, there must still be a determination that the deposits constitute valuable mineral deposits under the mining laws by application of the prudent man test as implemented by the marketability test in order to validate the mining claims for such deposits.

Mining Claims: Discovery

In applying the prudent man test of discovery to mining claims containing vast deposits of sand allegedly valuable for use in glass manufacture, it is necessary to show that the deposits were marketable at a profit prior to the withdrawal of land embracing the claims; the mere fact that the claims are nearer a glass manufacturer than its present source of supply is not sufficient to show marketability where there is no general open market for such material and there was no direct attempt to capture a part of the limited and exclusive glass sand market prior to the withdrawal.

Mining Claims: Hearings – Rules of Practice: Hearings

A request by mining claimants for a further hearing in a mining claim contest will be denied where it does not appear that it could be productive of evidence which would show that deposits of sand were marketable prior to a withdrawal of the land as necessary to validate the claimant's claim, as a tender of some additional evidence merely corroborates the determination that there was no market at that time, and where there is no equitable basis shown justifying another hearing.

IBLA 70-18: Oregon Contest Nos. 018149 : through
018153

UNITED STATES : Placer mining claims declared v.
: null and void
MAURICE DUVAL, ET AL. : Affirmed as modified

DECISION

Maurice Duval has appealed to the Secretary of the Interior on behalf of himself and other mining claimant contestees from a decision by the Chief, Branch of Mineral Appeals, Office of Appeals and Hearings, Bureau of Land Management, dated November 5, 1968, affirming a hearing examiner's decision of March 15, 1968, declaring the Dreamer Nos. 1 through 14 and 16 through 25 placer mining claims to be null and void. 1/

1/ The contest number, names of the claimants and the mining claims involved are as follows:

<u>Contest</u>	<u>Claimants</u>	<u>Mining Claims</u>		
Oregon 018149	Maurice and Marianne Duval 7, 11	Dreamer Nos. 3, 4,		
Oregon 018150	Maurice and Marianne Duval John and Anna Duval 25	Dreamer Nos. 12, 23,		
Oregon 018151	Maurice and Marianne Duval John and Anna Duval Harold and Betty Duval	Dreamer No. 5		
Oregon 018152	Maurice and Marianne Duval Harold and Betty Duval Henry and Hazel Johnson	Dreamer Nos. 1, 2, 6, 19, 20, 21, 22, 24	John and Anna Duval	13,
Oregon 018153	Maurice and Marianne Duval Harold and Betty Duval Henry and Hazel Johnson Gary and Ellen Sandstrom	Dreamer Nos. 8, 9, 10	John and Anna Duval	

These mining claims were all located on September 23, October 5, or December 30, 1959, as placer silica quartz sand claims. They are situated within Ts. 23 and 24 S., Rs. 13 W., W.M., Coos County, Oregon, in the Siuslaw National Forest. The 24 claims embrace a total area of 3080 acres. Since July 18, 1961, the area embracing the claims has been included in applications by the Forest Service for the creation of the Oregon Dunes Recreation Area, which served to preclude the location of mining claims thereafter by segregating the land from appropriation under the mining law. Accordingly, in order to be preserved the claim must be shown to have been valid on that date.

The contest proceedings were brought at the instigation of the Forest Service charging as follows:

a. The material found within the limits of the claims was not on or before July 18, 1961, a valuable mineral deposit under section 3 of the Act of July 23, 1955 (69 Stat. 367; 30 U.S.C.A. 601, et seq.).

b. On or before July 18, 1961, valuable minerals had not been found within the limits of the claims so as to constitute a valid discovery within the meaning of the mining laws.

After a hearing on these charges the hearing examiner concluded that the deposits of silica sand for which the claims were located are a common variety of sand since there is such a vast quantity of sand in the Coos Bay area and in the Pacific Northwest and California with qualities useful for glass making. He also found there had not been a valid discovery of a valuable mineral and the material is not subject to location under the mining law, and he declared the claims null and void.

In affirming the decision the Chief, Branch of Mineral Appeals, extensively reviewed the evidence presented at the hearing and discussed appellants' objections to the hearing examiner's decision. Appellants have pointed to no specific factual error in the Bureau's decision, but dispute the conclusions reached therein.

Generally, appellants urge reversal of the decisions below on the ground that the evidence showed that this sand is not a common variety because it is distinguishable in quality and has a special and distinct value from other sands on the Oregon coast. Appellants contend the sand within these claims has special value because it contains silica and feldspar and has uniform physical and chemical properties useful in making amber glass and for other glass production. They contrast this usage with usage of common varieties of sand for building purposes. They also contend these deposits are more favorably located to rail transportation and deep sea barges than other sand deposits in the northwestern states. Furthermore, they contend the decision below indicated that there is too large a quantity for the sands to be an uncommon variety and that "Inversely, too little of a mineral of this quality would invalidate these claims." They assert that the sand is not "widespread" as used by the Bureau in relating the marketability rule, and that it is sufficient in showing a discovery of a valuable mineral deposit simply to show a general market for the sand rather than an actual existing market. In this respect appellants quote from a Solicitor's opinion of September 20, 1962, 69 I.D. 145, 146, which states:

When a nonmetallic mineral is not of extremely wide occurrence and when a general demand for that mineral exists, it may be enough, instead of showing an actually existing market for the product of that particular mine, to show that a general market for the substance exists of a type which a reasonably prudent man would be justified in regarding as one in which he could dispose of those products.

Appellants contend, in effect, that there was a general market for the sand as of and since July 18, 1961, because the deposits are located closer to one glass manufacturing place in Portland (Owens-Illinois) than its present source in Monterey, California, and because another manufacturer (Northwestern Glass) has expressed interest in these claims.

Generally, the evidence supports a determination that these sands may be useful in glass manufacturing, a use to which many common varieties of sand could not be put. It is also apparent

that other sands found in numerous deposits along the Oregon coastal regions and in the entire Pacific Northwest might also be used in glass making with varying needs for beneficiation, sizing and screening and these deposits are in the millions, if not billions, of tons.

The advantage of appellants' extensive sand deposits over other sand deposits in the area was testified to by appellants' witnesses, one of whom, a Bureau of Mines expert, indicated the basic factors sought in glass making. The first is that it must be of a specified size (from minus 20 to plus 140 mesh). The second is the mineralogical-chemical composition of the sand, as certain constituents, such as silica, would make it suitable for certain types of glass making providing the percentage was sufficiently high and the sand did not contain enough other substances deemed to be deleterious in the glass making process. Thus, for example, there would have to be a minimal percentage of iron to make it suitable for making clear glass containers, whereas a higher percentage of iron would be permissible for making amber glass used for beer bottles. The third criterion is whether the sand is uniform both physically and chemically over the entire area of the sand deposit. This witness testified that these sand deposits are more valuable for making amber glass than other properties on the Oregon coast, as they can be used without beneficiation for that purpose or can be used with beneficiation for other glass products and as a blend for making other glass products.

The Bureau's witness testified that the sands probably could not be beneficiated to reach the quality necessary to make container glass since the iron content would have to be reduced to less than 0.06%, but it could be used in amber glass or possibly flat glass if the iron content limit of 0.14% could be reached.

The evidence also shows that no sand has been sold from these claims. Appellants indicate that no attempt to sell sand from these claims was made prior to July 18, 1961, because their efforts had been directed to sampling and testing the material to get information which might be presented to glass manufacturers. Also, after that time they sought to obtain a favorable railroad freight rate to transport the material if it could be sold.

This brief summary of some of the more important facts in this case serves to establish the background whereby appellants' contentions are set in perspective. The major thrust of their

arguments in this appeal is directed toward the application of the marketability test in these circumstances alleging, in effect, that the showing that the sand is suitable for glass making and that there are two prospective customers in the Pacific Northwestern area is adequate.

It is true, as appellants suggest, that if there were only a limited amount of mineral material there would not be a valid discovery, as the prudent man test of discovery has always required sufficient mineralization to justify the expenditure of time and money, Castle v. Womble, 19 L.D. 455, 457 (1894). Appellants object to the emphasis in the decisions below as to the vast quantities of sand within these claims and the fact that there are additional vast quantities of sand elsewhere within the Pacific Northwest. Thus, they attempt to distinguish the situation here with that quoted supra in the Solicitor's opinion of September 20, 1962, which referred to a nonmetallic mineral not of "extremely wide occurrence." Appellants contend it is only necessary to show that a general market for sand suitable for glass making be shown instead of any actual market for these particular deposits. However, the statement quoted cannot be read as restricting the test to be applied since it indicated that it "may be enough" to show a general market.

Part of the problem here is that two basic issues have been intertwined, perhaps necessarily because of the inherent difficulties involved. The first issue which appellants have used as a justification for applying a different test as to marketability is whether or not the sand is a "common variety" within the meaning of sec. 3, act of July 23, 1955, 30 U.S.C. § 611 (1964), which provides that no deposit of common varieties of sand and certain other materials "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." Common varieties under the act do not include such materials "which are valuable because the deposit has some property giving it distinct and special value." If the sand is deemed a common variety under this act the deposits were not subject to location in 1959 when the claims were located, even if the sand was then marketable. Although the hearing examiner ruled the sand is a common variety, the decision of the Bureau on appeal stated that the testimony supported a finding that the silica sand is of wide occurrence but did not specifically determine whether the material is a common variety within the meaning of the 1955 act.

That decision held it was necessary to show more than a general market for the sand in order to validate the claims prior to the date of the withdrawal. Thus, the decision below resolved the case on the second issue involved here as to whether or not the sand constituted a valuable mineral deposit under the application of the prudent man test, and appellants' arguments on appeal are addressed principally to that issue. As we intend to resolve this case on the issue of discovery it is unnecessary to determine whether or not this deposit may be considered a common variety within the meaning of the act of July 23, 1955. Accordingly, the decisions below are modified to the extent that they treat the deposit as a common variety.

If we assume that this sand is not a common variety within the meaning of the July 23, 1955, act because it possesses properties giving it a "distinct and special value" for glass making within the meaning of the act, the question raised by appellants is what implication does this have insofar as the application of the prudent man test? In other words, would a finding that this deposit of sand has a "distinct and special value" automatically establish that a discovery of a valuable mineral deposit has been made sufficient to validate the claims? The answer is no. The only function served by an inquiry into the distinct and special value of the deposit is to ascertain whether the character of the mineral is such that it can be the subject of location under the mining law after July 23, 1955. Once that is affirmatively established the claims are subject to the same general test of discovery as are other locatable minerals. The act of July 23, 1955, did not alter the test of discovery with reference to sand, stone, etc. deemed uncommon under that statute. Discovery must still be demonstrated in accordance with the prudent man doctrine first enunciated in Castle v. Womble, *supra*.

The prudence of the locators and the value of the deposit must be measured by the application of the marketability test. United States v. Harold Ladd Pierce, 75 I.D. 255, 260 (1968), United States v. Frank Melluzzo and Wanita Melluzzo et al., 76 I.D. 181, 183 (1969).

There have been some differences in the extent to which the marketability test has been applied. This has been explained by the Supreme Court in United States v. Coleman, 390 U.S. 599, 603 (1968):

As we have pointed out above, 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. While it is true that the marketability test is usually the critical factor in cases involving nonmetallic minerals of widespread occurrence, this is accounted for by the perfectly natural reason that precious metals which are in small supply and for which there is a great demand, sell at a price so high as to leave little room for doubt that they can be extracted and marketed at a profit.

In United States v. Estate of Alvis F. Denison, 76 I.D. 233 (1969), a case involving low-grade manganese ore - a mineral not found in great abundance generally - it was held the showing of a general market for manganese ore was not sufficient where the ores could not be economically upgraded to meet the market place standards, and the cessation of a particular market (the United States government's stockpiling program) rendered the mineral deposits valueless. The significance of this is that where circumstances are apparent that there is in fact no market for the mineral deposit, the general assumption as to the product's marketability is rebutted and evidence showing there is a specific market becomes very significant to ascertain whether a prudent man could hope to develop a profitable mine. This is also true with respect to deposits of sand whether they are deemed to be common varieties or uncommon varieties within the meaning of the July 23, 1955, act. This is especially so where it is apparent that the alleged uncommon varieties are in great abundance or there are other vast sources of supply.

Although appellants contend the showing of a general market is all that is needed in this case, the evidence in the record and indeed appellants' own statements in this appeal indicate there is no general market in the sense that there is for minerals which have intrinsic value or where there is a prevailing demand for the mineral on the open market. On the contrary, the market that exists for silica sand is limited to a very few glass manufacturers who have their own sources of supply. The evidence showed that Owens-Illinois, the most probable customer for appellants, used only 20,000 to 30,000 tons a year in its operations in Portland. If we compare this with the vast quantity of sand on appellants' claims alone, estimated to be in the millions of tons, it is apparent that the possible demand is small in contrast to the possible supply from appellants' claims alone, excluding other possible sources.

The record indicates it is difficult for a supplier to break into the sand market in the glass industry. Appellants have stated that the testimony concerning the market for sand used in glass making indicated the manufacturers must have a "long source of supply" before an industry will even consider the material because they usually have their own source, and these sands are usually sold through closed contracts to consumers rather than on an open market as are metallic minerals.

Where there is no prevailing demand for a mineral on a general open market the marketability test is not met unless it can be shown either that there were actual profitable sales or that there were willing buyers to whom the claimant could reasonably have expected to sell at a profit. While the Department has never held that proof of actual sale is an indispensable element in establishing the marketability of mineral from a particular claim, it must be shown that the mineral could have been extracted, removed and marketed at a profit before the critical date, which in this instance is July 18, 1961. United States v. E. A. Barrows et al., 76 I.D. 299 (November 28, 1969), and cases collected therein.

Mr. Duval's testimony with regard to the marketability of this sand was strongly future-oriented, tending to show his belief that recent and anticipated developments in the industry will enable him to find a market in the foreseeable future, rather than demonstrating that the sands could have been marketed prior to the 1961 withdrawal.

The most that appellants have shown in this case is that the sand may be suitable for certain types of glass manufacture, particularly for the making of beer bottles, and that two major glass manufacturers in the Pacific Northwest may in the future be interested in the product from these claims. Actually, the evidence in the record did not support any assumption that the sand could be marketed to Northwestern within the foreseeable future due to the fact that it already has existing sources, but there might be some possibility of negotiations with Owens-Illinois because its present source is further away than these claims and is being depleted. This possibility, of course, was based primarily on facts arising since July 18, 1961, such as appellants' contact with the manufacturers and attempts to get favorable freight rate quotations. As appellants indicate, no effort was made to sell the product prior to July 18, 1961, as:

From the date of location to June 1961, which signifies the findings of the Bureau of Mines that the claims could be beneficiated to separate Fe₂O₃ (ExA) all efforts of the locators was [sic] devoted to prospecting, discovery and development by exploration, testing etc., to validate the location. (Appellants' brief to the Secretary, p. 6.)

After reviewing all of the evidence in this case, we believe the record supports the conclusion reached below. The prudent man test of discovery of a valuable mineral deposit was not satisfied prior to the time the claims were withdrawn July 18, 1961, because the evidence does not show that the materials could have been marketed at a profit as of that time and no attempt to capture part of the market has been successfully made. That mining claims must be validated by a discovery of a valuable mineral deposit as determined by an application of the prudent man test before lands are withdrawn is now well settled. See e.g., Mulkern v. Hammitt, 326 F. 2d 896 (9th Cir. 1964), United States v. United States Silica Corporation et al., A-30400 (August 24, 1965), aff'd Simplot Industries, Inc. v. Udall, Civil No. LV 1024 (D. Nev. June 19, 1969). In the latter case, it was held that silica sands must be shown to have been marketable at a profit prior to the withdrawal.

In view of the foregoing discussion, it is apparent that these claims were not validated by a discovery of a valuable mineral deposit as of July 18, 1961, and were properly declared null and void for that reason.

Appellants have requested a further hearing in this case as an alternative to reversal of the decisions in order to show additional evidence of economic factors relating to the sand deposits, including among other matters further information concerning freight rates prior to and since July 18, 1961. They have also submitted letters from Owens-Illinois to support their contentions regarding the marketability of the sand. The evidence submitted at the hearing must be the basis for any decision, including one made on appeal. However, further information may be considered on appeal solely to ascertain whether a further hearing is warranted. For this reason, we quote from Owens-Illinois' letter to appellants dated May 13, 1970:

Thank you for conducting our representatives over the Coos Bay sand deposits and assisting them in obtaining samples. The quality is such that we would be interested in taking an option on a portion of the deposit, assuming a satisfactory economic arrangement can be worked out.

During the option period, we would test the deposit extensively. We know from our experience investigating several of the other large deposits on the Oregon Coast that they contain impurities which are almost impossible to remove economically. Although your deposit does appear better in this regard, our quality requirements are such that it is important for us to make a very extensive survey.

We would be pleased to meet with you soon and, assuming that we can satisfactorily work out all the details, we might then enter into a formal option agreement.

This and other letters from Owens-Illinois manifest an interest in the deposit of sand within these claims. Appellants contend that one of the difficulties in consummating a contract is the lack of clear title to the deposit. However, the letters indicate also that at the most the manufacturer might take an option on part of the deposit in order to test the material to determine if it meets the particular specifications and requirements of that company. Thus, the evidence tendered since the hearing simply shows the results of further negotiations by appellants with Owens-Illinois. However, they have not shown that a firm agreement has been reached. Indeed, the suggested terms by Owens-Illinois indicates that it is uncertain as to whether or not the sand meets its particular requirements. This does not establish that the sand is marketable now, and corroborates the determination that the deposit was not marketable prior to July 18, 1961.

In short, since appellants have not shown anything which would indicate there is a likelihood that a further hearing would be productive of additional evidence which would help their position, and also have failed to show any equitable basis justifying a further opportunity in this respect, we must deny the request for a further hearing. Cf. United States v. David L. King.

A-30867 (February 28, 1968), United States v. Rodney Wood et al., A-30697 (May 31, 1967), United States v. Lawrence R. Dowell et al., A-30614 (November 21, 1966).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

Edward W. Stuebing, Member

I concur:

I concur:

Martin Ritvo, Member

Francis Mayhue, Member

