

Editor's note: Appealed -- aff'd, Civ. No. LV-74-70 RDF (D. Nev. Oct. 1, 1975)

UNITED STATES
v.
WILLIAM A. McCALL
AND R. J. KALTENBORN

IBLA 70-379

Decided November 25, 1970

Mining Claims: Discovery -- Mining Claims: Common Varieties of Minerals

In order to satisfy the requirements for discovery on a mining claim located for common varieties of sand and gravel prior to July 23, 1955, it must be shown the materials could have been extracted, removed, and marketed at a profit prior to that date. Where mining claimants fail to prove by a preponderance of the evidence that the materials from their claim could have been extracted, removed, and marketed at a profit prior to that date, the claim is properly declared null and void for the lack of a timely discovery of a valuable mineral deposit.

Mining Claims: Discovery: Marketability

The "marketability rule" which was formulated by the Department and judicially approved is not such a rule as is required to be published in the Federal Register in accordance with the Administrative Procedure Act.

Mining Claims: Hearings -- Mining Claims: Contests -- Rules of Practice: Hearings

In an administrative proceeding to determine the validity of a mining claim, due process consists of notice and opportunity for hearing, and it suffices if the claimant is afforded the opportunity to be present and heard. The procedure followed by the Department of the Interior in the initiation, prosecution, and deciding of mining contest cases is in compliance with the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (Supp. V, 1965-69).

IBLA 70-379

: Nevada Contest 063855

UNITED STATES

: Placer mining claim
: declared null and void

v.

WILLIAM A. McCALL

: Mineral patent
: application rejected

R. J. KALTENBORN

: Affirmed

DECISION

William A. McCall and R. J. Kaltenborn appealed to the Director, Bureau of Land Management, 1/ from a decision dated October 1, 1969, whereby a hearing examiner declared the Henderson Heights No. 3 placer mining claim null and void for lack of a discovery of a valuable mineral deposit prior to July 23, 1955, and rejected their mineral patent application Nevada 063855.

This proceeding was initiated by a contest complaint filed by the Manager of the Nevada land office challenging the validity of the Henderson Heights No. 3 placer mining claim, and alleging, inter alia, (1) minerals have not been found within the limits of the claim in sufficient quantities and/or qualities to constitute a valid discovery, and (2) no discovery of a valuable mineral has been made within the limits of the claim because the mineral materials present cannot be marketed at a profit and it has not been shown that there exists an actual market for these

1/ The Secretary of the Interior, in the exercise of his supervisory authority, transferred jurisdiction over all appeals pending before the Director, Bureau of Land Management, to the Board of Land Appeals, effective July 1, 1970. Circular 2273, 35 F.R. 10009, 10012.

materials. The contestees answered denying these allegations and a hearing was held on March 19, 1969, at Las Vegas, Nevada. At the hearing, the contestant was represented by a Field Solicitor of the U.S. Department of the Interior; Mr. McCall, who was not present, was represented by counsel; and Mr. Kaltenborn, without counsel, attended a portion of the hearing and testified.

The contested claim was located on October 26, 1953, embracing the SW 1/4 sec. 16, T. 22 S., R. 63 E., M.D.M., Clark County, Nevada. It is situated approximately 1-1/4 miles east of Henderson, Nevada, and about 18 miles from the center of Las Vegas, Nevada. The claim is part of an alluvial fan consisting entirely of sand and gravel of volcanic origin. The material is suitable for fill and for general road construction and building purposes, which are the same general uses made of other sand and gravel deposits in the Las Vegas area. It possesses no special or unique property which would make the material suitable for uses other than those already stated.

The workings of the claim consist of 8 bulldozer or backhoe cuts and two larger pits. One of these large pits is in the northwest corner of the claim. The other large pit is in the northeast corner of the claim. A maximum of 12,000 cubic yards of sand and gravel were removed from the claim from the date of location in 1953 through 1962. This material was all removed from the pit in the northwest corner of the claim. This averages out, over the ten-year period, to 1,200 cubic yards per year. Mr. Kaltenborn testified he had not removed any material from this pit. He thought the material was removed "by a road contractor when the road was built."

About 30,000 cubic yards of material were removed from the pit in the northeast corner of the claim during the period from December 1963 into March 1964. The material was removed by Contestee Kaltenborn for use in a development in which he owned an interest. Mr. Kaltenborn stated that he sold the land upon which the Royal Crest Rancho development was built and furnished the contractor material from this claim.

Mr. Kaltenborn was not very definite concerning the amount of material removed from the contested claim and the years when the removal occurred. He stated he had worked the areas surrounding the Henderson Heights No. 3 claim and had received a patent for a claim contiguous to the contested claims. He was unable to recall the particular area or claim from which the material was removed.

Contestant's witness, Kuhlman, a mining engineer, testified that after his examination and investigation of the claim, he recommended the contest charges for the reason that no actual market for the material had been demonstrated. Contestant's witness, Webb, a geologist, who examined the claim with Kuhlman, agreed that an actual market for the material from the Henderson Heights No. 3 had not been demonstrated. He was of the opinion that the material on the subject claim could not have been mined, removed and marketed at a profit prior to July 23, 1955, because it was too far from the general market of Las Vegas valley, which was supplied by closer competitive suppliers. He testified the claim "is situated at a point where it [haulage costs] would be prohibitive for much of the Las Vegas area."

In his decision the hearing examiner properly stated that for a mining claim to be valid there must be a discovery of a mineral deposit of sufficient value to satisfy the prudent man test enunciated in Castle v. Womble, 19 L.D. 455, 457 (1894), and more recently reaffirmed in United States v. Coleman, 390 U.S. 599 (1968). He pointed out that Congress withdrew deposits of common varieties of sand and gravel from location under the mining laws on July 23, 1955, 30 U.S.C. § 611 (1964), and from the evidence adduced at the hearing, there can be no doubt that the mineral on the mining claim is a common variety material.

The examiner quoted from United States v. Alfred N. Verrue, 75 I.D. 300 (1968), which follows the basic principles sustained in Coleman, *supra*, that in order to satisfy the requirement of discovery on a placer mining claim located for sand and gravel prior to July 23, 1955, it must be shown that, prior to that date, the deposit could be extracted, removed and marketed at a profit and a demand existed when the deposit was subject to location. It also must be shown that the particular deposit could at the critical date, be mined and marketed at a profit. The cited case expressly held the two critical elements are: (1) it is essential to show not only that the minerals in question could be sold at the critical date but they could have been sold at a profit, and (2) especially where minerals are of widespread occurrence, it must be shown that minerals from the particular deposit in question could have been marketed at a profit. He noted the marketability test is a refinement of the prudent man test, citing Coleman, *supra*. It is incumbent upon one who located a claim for a common variety of sand and gravel prior to July 23, 1955, to show all the requirements for a discovery, including a showing that the minerals could have been extracted, removed and marketed at a profit had been met by that date. The

The marketability test has been specifically held to apply in determining the validity of sand and gravel claims in the Las Vegas area. Palmer v. Dredge Corporation, 398 F. 2d 791 (9th Cir. 1968), cert. denied, 393 U.S. 1066 (1969); Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959).

We adopt the examiner's findings that the sand and gravel on the Henderson Heights No. 3 placer mining claim is a common variety within the purview of the act of July 23, 1955, supra; that the contestant's witnesses clearly established a prima facie case that the claim was invalid; and that the contestees had the burden of proving by a preponderance of credible evidence that the material from the claim could have been extracted, removed and marketed at a profit prior to July 23, 1955.

The examiner further found that prior to the critical date, the only real market for the material on the Henderson Heights No. 3 placer claim was Henderson, Nevada, about 1-1/4 miles from the claim. Henderson is a small town with a very limited need for sand and gravel and other claims in the immediate area were being worked to supply whatever market was available. Concerning other possible markets, such as Las Vegas and Boulder City, the hauling costs would not permit competition with suppliers nearer those markets. The hearing examiner held that contestees presented no probative evidence to contradict contestant's evidence that the sand and gravel material from the contested claim could not have been marketed at a profit prior to July 23, 1955, because there was not actual market for the material. Furthermore, an actual market for the material had not been developed even as late as 1964.

The hearing examiner discussed at length the authority of the Department of the Interior concerning the disposition of public lands and correctly held that as long as legal title remains in the United States, the Department has the power to determine the validity of mining claims after due process, which consists of notice and an opportunity to be heard.

On appeal appellants assert that minerals have been discovered and/or removed from lands adjacent to this claim. A discovery on one claim does not inure to the benefit of another. United States v. Charles H. Henrickson, et al., 70 I.D. 212, 215 (1963), aff'd. Henrickson v. Udall, 229 F. Supp. 510 (D. Cal. 1964), aff'd. 350 F. 2d (9th Cir. 1965), cert. denied 380 U.S. 940 (1966). United States v. J. R. Osborne et al., 77 I.D. 83 (1970).

The appellants assert the decision appealed from is erroneous in that "it enumerates requirements to constitute discovery in addition to the requirements provided by the Mining Laws." This assertion has no merit because the mining statutes do not specifically define a "discovery." The "prudent man test," enunciated by the Department in 1894 in Castle v. Womble, *supra*, has long been approved as the standard for a discovery. Chrisman v. Miller, 197 U.S. 313, 322 (1905); Cameron v. United States, 252 U.S. 450 (1920); Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963); United States v. Coleman, *supra*.

Appellants' contention that the so-called "marketability test" was not in effect when the contested claim was located in 1953 is without merit. The Department for many years has applied the test of marketability in determining whether or not various materials constitute "valuable mineral deposits" within the meaning of the mining laws. See Layman, et al v. Ellis, 52 L.D. 714 (1929), and cases therein cited.

Appellants contend that the additional requirement of "Marketability at a profit" to establish a discovery on a mining claim is illegal and unconstitutional because it is vague and uncertain and was never published in the Federal Register. In discussing the marketability test the United States Supreme Court in United States v. Coleman, *supra*, was not of the same opinion for it said:

* * * Indeed, the marketability test is an admirable effort to identify with greater precision and objectivity the factors relevant to a determination that a mineral deposit is "valuable." It is a logical complement to the "prudent man test" which the Secretary [of the Interior] has been using to interpret the mining laws since 1894 The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the costs of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent-man test, and the marketability test which the Secretary has used here merely recognizes this fact 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. 390 U.S. 602, 603.

Therefore, appellants' attempt to convert this recognized standard into a new substantive rule is unfounded. United States v. E. A. Barrows, et al., 76 I.D. 299, 304-305 (1969), Fn. 5. The same issue, lack of publication of the marketability test in the Federal Register, was raised by the respondents in Coleman, supra, in their petition for a rehearing. Rehearing was denied May 27, 1968, 391 U.S. 961.

Appellants contend that the common varieties provision of the act of July 23, 1955, supra, is applicable only to mining claims located after the passage of that act. This contention is without merit. In Palmer v. Dredge Corporation, supra, a case involving mining claims located prior to the passage of the act in the Las Vegas area for sand and gravel, the United States Court of Appeals for the Ninth Circuit approved the Department's holding that marketability had to exist prior to July 23, 1955, in order to fulfill the "present marketability" test. As previously noted, certiorari was denied by the Supreme Court, 393 U.S. 1066 (1969).

Appellants imply that the decision below is contrary to the Administrative Procedure Act, 5 U.S.C. § 552 (Supp. V, 1965-69), and a denial of due process under the Constitution. These implications are without merit. Due process consists of notice and a hearing. Due process is satisfied whenever a claimant is afforded these elements. Best v. Humboldt Placer Mining Co., supra, and cases cited. Appellants have not pointed to any aspect of this case that differs from the usual processing of such cases. Such procedure has long been recognized and approved by the courts. United States v. Charles D. and Jeanne D. Haas, A-30654 (February 16, 1967), and cited cases. It is well established that the procedure followed by the Department in the initiation, prosecution and deciding of contests in mining cases is in compliance with the Administrative Procedure Act, supra. See Haas, supra, and cases cited.

In conclusion, the contestees' evidence concerning the removal of sand and gravel from the claim was at best general and vague. As to the 10,000 cubic yards which Kaltenborn stated he had "scalped" from a wash area on the claim in 1954-1955, no sales data or information was offered in evidence. His next removal was in 1962 or 1963, and no sales data was offered for the latter period. In any event, infrequent sales of sand and gravel do not prove such material could be mined and marketed at a profit. Therefore, we conclude that a market previous to July 23, 1955, was not established

for the material on the contested claim. United States v. Joe H. and Jemina York, A-28806 (August 16, 1962). The holding of a mining claim as reserves of sand gravel for future development does not impart validity to the claim. United States v. Fischer Contracting Co., et al., A-28779 (August 21, 1962). The appellants failed to prove the validity of their mining claim by a preponderance of the evidence, Foster v. Seaton, supra. Accordingly, the subject mining claim was properly declared null and void, and the patent application was properly rejected.

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.

Francis E. Mayhue, Member

I concur:

I concur:

Edward W. Stuebing, Member

Martin Ritvo, Member

