

Editor's note: Reconsideration denied by order dated Feb. 10, 1972; Appealed -- aff'd, Civ. No. 71-649 (D. Ariz. April 13, 1973)

UNITED STATES
v.
WILLIAM D. PULLIAM ET AL.

IBLA 70-29

Decided December 8, 1970

Mining Claims: Discovery: Marketability -- Rules of Practice:
Appeals: Burden of Proof

The Government, in establishing its prima facie case that there has not been a discovery of a valuable mineral deposit, is not required to prove the lack of any economic value of surveying all market possibilities.

Mining Claims: Discovery: Marketability -- Rules of Practice:
Appeals: Burden of Proof -- Mining Claims: Withdrawn Land

Where the Government has presented a prima facie case that there has not been a discovery of a valuable mineral deposit, the mining claimants then have the burden of proving by a preponderance of the evidence that there was a discovery of a valuable mineral composed of commonly found minerals which could have been marketed at a profit before the land was withdrawn from appropriation under the mining laws.

Mining Claims: Discovery: Marketability -- Mining Claims:
Hearings -- Rules of Practice: Evidence

Findings by a hearing examiner in a mining contest that the marketability test was not satisfied as to building stone and a pumicite-like material prior to a withdrawal of the land will not be disturbed where the factual conclusions could be deduced from testimony at the hearing.

IBLA 70-29

: Arizona Contest No. A-746

UNITED STATES : Placer mining claims declared

v. : null and void

WILLIAM D. PULLIAM ET AL.

: Affirmed

DECISION

William D. Pulliam and Edward M. Olea, doing business as the White Rose Mining Company, have appealed to the Secretary of the Interior from a decision by the Chief, Branch of Mineral Appeals, Office of Appeals and Hearings, Bureau of Land Management, dated January 22, 1968, which affirmed a hearing examiner's decision of February 28, 1968, declaring the White Rose Nos. 1 and 2 and the White Santa Lascella No. 1 placer mining claims to be null and void for lack of a timely discovery of a valuable mineral deposit on the claims.

These three claims are on unsurveyed lands in what will probably be section 5, T. 5 S., R. 20 W., G.S.R., Meridian, Yuma County, Arizona, when surveyed. The record discloses that there was some question as to the actual location of the claim markers and the exact area of the claims, but that they were generally identifiable. The original location of the claims was made in 1929 by relatives of appellant Olea. Appellant Pulliam became interested in the claims in 1957, and he and Olea gained all of the interests in the claims in a quiet title proceeding in 1967. By Public Land Order No. 848 of July 1, 1952, the area embracing these claims was withdrawn from all forms of appropriation under the public land laws, including the mining laws, subject to valid existing rights, for use by the Department of the Army as part of the Yuma Test Station. Leasehold condemnation proceedings were instituted by the Army against these claims but have been held in abeyance pending this contest proceeding.

The decisions below found that the claims had not been validated by a discovery of a valuable mineral deposit as of July 1, 1952, the date of withdrawal of the lands. This conclusion was reached after a discussion of the law and its application to the facts adduced by the hearing held in this case. After reviewing the entire record we agree generally with the analysis of the evidence and the conclusions of law reached in the decisions below, and we adopt generally the findings and

conclusions of these decisions. We shall simply emphasize certain points in answer to appellant's appeal, which consists primarily of a copy of a letter written by Mr. Pulliam to various Members of the Congress, newspapers and others concerning the Bureau's decision on these claims, and a copy of the contestees' statement of reasons in their appeal to the Director, Bureau of Land Management.

The appellants basically allege that the claims are valuable for two products: a building stone and a very fine, flour-like material similar in its mineral make-up and certain physical properties to pumicite, but which appellants now agree is not pumicite.

The appellants do not dispute statements in the decision below that the Government in contesting these claims had only the burden of going forward with sufficient evidence to establish a prima facie case, and that once this has been done the burden of proof is upon the mining claimant to show by a preponderance of the evidence that there has been a discovery of a valuable mineral deposit on the contested claims. Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959). They contend, however, that the Government failed to establish a prima facie case, that appellants did show that the materials on the claims were valuable and marketable in 1952, and that this was not disputed by the Government.

The main thrust of appellants' objections is that the Government did not investigate the 1952 market potentialities of the stone and the pumicite-like material. They contend that the Bureau erred in ruling there was no market when the Bureau's witnesses had not conducted a market survey. They contend that the decisions below erroneously assumed lack of marketability because of the absence of a large sale of the material and incorrectly ruled that the market was being supplied from other sources or quarries when there was no proof to substantiate this.

Basically, appellants' objections show a failure to understand how the burden of proof is met in a case such as this. Although they do not dispute the Foster v. Seaton test, their contentions concerning its application show a lack of comprehension of the test. As indicated, under that test the Government bears only the burden of establishing a prima facie case. This was satisfied by the evidence presented by the Government which showed that the fine material on the claim was composed of a mixture of minerals found in common abundance and suggesting that the composition had no apparent valuable commercial use

warranting the expenditure of time and money by a prudent man in anticipation of developing a valuable mine. All of the evidence of the Government tended to show that the deposit was not valuable under the mining laws because the mixture of the minerals did not seem to constitute a valuable mineral product. A letter from the Bureau of Mines, Bartlesville, Oklahoma, where the pumicite-like material was examined included the statement, "As far as we know, this type of material would have no commercial value." (Contestant's Exhibit 13.) One of the contestant's expert witnesses declared on direct examination:

My opinion from the evidence I received and which I have reason to believe, this material is nothing more than a type of dirt and as such I don't think anyone could mine it and make any money at it or have an opportunity to try to make any money at it. (Tr. 66-67)

Although appellants attempt to discredit the testimony of the Bureau witnesses, the evidence adduced was adequate to establish the prima facie case.

Appellants attempt to make much of the failure of the Government witnesses to testify as to a survey of market possibilities and conditions in 1952. Of course, because the lands were withdrawn, for the claims to be found valid there must be a showing that there was a discovery of a "valuable mineral deposit" as of the date of the withdrawal and this is determined by application of the prudent man test of discovery as complemented by the marketability test for nonmetallics. United States v. United States Silica Corporation et al., A-30400 (August 24, 1965), affirmed, Simplot Industries, Inc. v. Udall, Civil No. LV 1024, (D. Nev., June 19, 1969). See also United States v. Coleman, 390 U.S. 599, 602 (1968), which makes clear that marketability at a profit "is an important consideration in applying the prudent-man test" and that minerals are not economically valuable under the mining laws if no prudent man will extract them because there is no demand for them at a price higher than the cost of extraction and transportation. Appellants would place the burden of proving conclusively that there was no market in 1952 upon the Government in their contentions that the Government did not make a survey of the market possibilities and conditions then. Under the Foster v. Seaton test, however, the Government does not have

the burden which the appellants are attempting to shift to it. Theoretically, most earth products have some potentiality for use in some commercial enterprise. Where common minerals are involved which do not have obvious values on the market-place, the Foster v. Seaton test does not require the Government to establish the lack of any economic value by surveying all market possibilities, as this would require the Government to do more than the mining claimants had been able to do in attempting to find a market for the materials on the claim. Instead, the Foster v. Seaton test establishes that the mining claimant has the burden of showing by a preponderance of the evidence that the deposit is a valuable mineral deposit, and that in order to justify the claimant's possession, he must

... show by reason of accessibility bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit. 271 F. 2d 838, the court quoting with emphasis from Layman v. Ellis, 54 I.D. 294, 296 (1933).

Thus, after presentation of the Government's prima facie case, it was the contestees who had the burden to show by a preponderance of evidence that the materials from the claims could have been marketed at a profit as of the time of the withdrawal in 1952 to establish that there was then a discovery of a valuable mineral deposit.

The contestees' evidence did show that the fine flour-like material has commercial potential and might be used as a diluent and carrier for insecticides, fungicides, organic compounds, as a flattening agent in paints, as a pozzolan in concrete mixtures, as an ingredient in making ceramics and fire brick, as a polishing agent, and for other possible uses. Much of the evidence as to these uses was testimony by the two appellants of their attempts to promote the use of this material with different individuals and companies. Most of these promotion and marketing attempts were by Pulliam after he became interested in the claims in 1957, five years after the lands had been withdrawn. Most of appellant Olea's promotion efforts to sell the material also took place after the withdrawal, and he indicated that the people he contacted were interested in the product but refused to make any agreement when they found out the land was tied up by the

Army (see, e.g., Tr. 212, 222). The only actual sales of any of the material from the claims prior to the withdrawal was during the 1930's and 1940's when appellant Olea and his relatives were unemployed and would take small bags of about a pound of the material from house to house to sell for 25 to 35 cents a bag as a polishing agent (see e.g., Tr. 209-211). Olea also testified that about 600 pounds of the fine material had been used by him in 1939 in a truck garden in California, that it helped counter the alkali soil and improved the growth of his vegetable plants (see Tr. 230-232, 266-272). Gilbert Jones who had been in the stone business from 1950 to 1967 in California testified that he would have been interested in purchasing rubble stone from the claims prior to 1952 for resale for building purposes as the market for such stone was beginning to develop at that time (Tr. 97-110). There was also testimony as to attempts to lease the claims prior to 1952 which were unsuccessful.

The appellants contend that the decisions below erred in reaching their conclusions as there was no proof to substantiate the conclusions and thus procedural rules have been violated. It is not necessary to discuss these allegations in detail. The only finding they cite which may not be supported by the evidence is the hearing examiner's statement as to the necessity for the construction of a road to the claims from Fisher's Landing on the Colorado River. However, this was not a crucial finding, and even if we consider it in error it is not sufficient to overcome the other findings which tend to show that marketability as of 1952 had not been proved sufficiently. Some of the other conclusions were reached by facts drawn from the testimony of the contestees' own witnesses. This was not in violation of any rules to which appellants have referred and we see no reason to disturb the general factual conclusion that the marketability test was not satisfied as to the building stone or the pumicite-like material prior to the withdrawal, since that conclusion could be deduced from the testimony at the hearing, even if some of it is from the contestees' own witnesses.

For example, appellants contend that the decisions err in finding that the market in 1952 was being supplied from other sources or quarries. From Jones' testimony as to building stone it was apparent that he obtained his stone from sources other than these mining claims so it is obvious that his demand was being met from other sources or quarries. Appellants contend that the decisions relied on unproved assumptions. However, likewise, the testimony of Dr. George Olsen (see especially Tr. 180-187) indicated the types

of material used for many of the uses alleged for the pumicite-like material, and some of their sources. These materials are materials such as fine sand, or mica, or clays and pumicite which may be commonly found. He noted that some of these materials used on the East Coast for fillers in plastic, etc., were even being imported because of cheaper transportation costs from European ports than from the western states by rail. Since there were other materials and other sources it is reasonable to conclude that the general market in 1952 was being met. This conclusion does not mean absolutely that the claimants' products could not have been sold in 1952. However, it is necessary to show more than the general market for such material at that time. The proof must show that it would have been possible because of the development of the claims, favorable transportation, proximity to market, and a demand for the materials from these particular claims that a portion of the market could have been captured by the claimants at that time. Osborne v. Hammit, Civil No. 414 (D. Nev., August 19, 1964). Mere statements of optimism and belief and speculation as to what might have been done is not sufficient here.

With respect to the interests of others in leasing the claims prior to the withdrawal, Pulliam in his letter of appeal suggests that a deposition be taken of a wealthy man who will tell of his willingness to lease the property in 1945 but that legal problems of trying to locate the heirs and sickness within the group prevented the lease from being transacted. His name was not given. However, submitted with this appeal is a copy of a statement by Maurice Caraco, who may be the man referred to. His statement indicates that he had an interest in leasing and developing the claims in 1945. Because the record produced at the hearing must be the basis for any decision in this case, this statement presented on appeal has been reviewed only to ascertain whether or not any further evidentiary proceeding might be warranted. However, even if we assume that the writer of this statement is the wealthy man referred to by Pulliam and that he was at one time interested in the leasing of the property, the fact which is apparent from his statement is that he did not. Further, there is nothing to indicate that he would have been prudent in so doing. Thus, we do not see that the reopening of the hearing or ordering of a deposition would serve any useful purpose in this case.

The appellants' attorney has also requested the opportunity to present an oral argument in this case. Because the main issues in this case have been factual and appellants' written contentions

with respect to them have been read, and a consideration of the facts must be based on the record made at the hearing, it does not appear that presentation of any oral argument would be of benefit in this case and, therefore, this request is denied.

To conclude, we find that the decisions below were correct in determining that there was not a discovery of a valuable mineral deposit as of the time the claims were withdrawn by the Army and the claims were properly declared null and void.

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

