

Editor's note: 78 LD. 173 (IBLA decision not in "I.D." format)

UNITED STATES
v.
ALBERT B. BARTLETT ET AL.

IBLA 71-62 Decided May 13, 1971

Mining Claims: Discovery: Marketability

In order to sustain a placer mining claim located for gypsum, it must be shown that the gypsum within the limits of the claim could have been extracted, removed, and marketed at a profit when the lands embracing the claim were withdrawn as part of a military reservation.

Mining Claims: Discovery: Marketability

The requirement that deposits of gypsum be marketable at a profit prior to the withdrawal of the lands embracing the claim has not been satisfied where it is clear that no open market for the product existed, no mining operations had been conducted on the claim, no sales of gypsum had been made, and no effort to establish a market for these specific gypsum deposits had been made by the claimants prior to the date of the withdrawal.

2 IBLA 274

IBLA 71-62: Colorado Contest 421

UNITED STATES :

v.

ALBERT B. BARTLETT ET AL.

:
Placer mining claim
: declared null and void
:
: Affirmed

DECISION

Albert B. Bartlett et al. have appealed to the Secretary of the Interior from a hearing examiner's decision dated September 16, 1970, which declared their Jeep No. 3 placer mining claim to be null and void for want of a discovery of a valuable mineral deposit within the limits of the claim.

The facts of record show that the Jeep No. 3 placer mining claim which covers the NW 1/4 sec. 35, T. 17 S., R. 67 W., 6th P.M., El Paso County, Colorado, was located on November 1, 1964, by appellants Albert B. Bartlett, Hilary G. Bartlett, Gloy Jett, Wilma Jett, W. A. McKenney, J. C. McKenney, Glenn K. Rogers, and Mary E. Rogers. The claim was located for a gypsum bed which is exposed in the vicinity of the southwest corner of the claim. However, before any mining had been performed on the claim and before any sales of gypsum had been made, the lands involved were withdrawn from all forms of entry, including mineral entry, by P.L.O. 3731 which expanded the boundaries of the Fort Carson Military Reservation on July 6, 1965.

Contest proceedings were initiated by the Bureau of Land Management's Colorado land office manager in a complaint of June 7, 1967, charging that the Jeep No. 3 was not a valid mining claim because no valuable mineral deposit had been discovered within the limits of the claim. The parties stipulated at a prehearing conference held on April 16, 1969, inter alia, that a discovery of a valuable mineral deposit (in this case the mineral being gypsum) must have been made prior to the withdrawal of the lands added to the Fort Carson Military Reservation on July 6, 1965, and such discovery must subsist to the date of hearing. On February 18, 1970, a hearing was held at Canon City, Colorado.

Evidence presented at the hearing established that the gypsum is of extremely widespread occurrence in Colorado, New Mexico, and other states. The deposits on the Jeep No. 3 are thin, interbedded with impurities, shale and mudstone, but the gypsum is of commercial quality.

In his decision, after briefly summarizing the testimony and other evidence presented at the hearing, the examiner focused on the key issue in this case, stating, "[T]he only issue for determination is the legal issue of whether a discovery could have been perfected as of July 6, 1965, without a showing of a market for the gypsum from the claim as of that date." In discussing the requirements for a discovery of a valuable mineral deposit, the examiner pointed to the so-called prudent man test of discovery, first announced by the Department in Castle v. Womble, 19 L.D. 455, 457 (1894), and reiterated in innumerable subsequent decisions approved by the courts. He also quoted extensively from United States v. Coleman, 390 U.S. 599, 603 (1968), which emphasized that the element of marketability at a profit, or the so-called "marketability test" is an inherent part of the prudent man test. The examiner concluded that the uncontroverted evidence could only lead to the finding that as of July 6, 1965, and as of the date of the hearing, a market did not exist for the gypsum found on the Jeep No. 3 claim. He held that the Coleman case makes it clear that a discovery of a valuable mineral deposit is not perfected until it can be shown that the mineral can be extracted, removed and marketed at a profit.

On appeal to the Secretary, the contestee takes exception to the rulings below, contending (1) the hearing examiner erred in making a finding of fact that a market did not and does not exist for the gypsum found on the Jeep No. 3 claim; (2) the hearing examiner erred in not finding that a market for gypsum from the Jeep No. 3 claim existed as set forth in Exhibits J and K involving other gypsum claims ^{1/}; and (3) the cases applied by the hearing examiner in this matter are not applicable for the reason that they involve claims for materials that have been since designated by Congress as common minerals in 30 U.S.C. § 611 (1964); and in those cases the surface of the mining claims involved would be utilized for purposes other than mining.

^{1/} Contestee's exhibits J and K consist, respectively, of (1) Patent No. 1237347 to the Ruby Company for 199.959 acres in Eagle County, Colorado, November 19, 1964; (2) Patent No. 49-69-0054 to Dresser Industries, Inc. for 540.95 acres in Big Horn County, Wyoming, April 10, 1969, and accompanying mineral reports.

We have reviewed the entire case record, carefully considering the testimony and evidence adduced at the hearing, and find that the hearing examiner's discussion of the law and his findings are correct. The controlling legal principals applicable to the facts of this case are well-settled precedents. A mining claimant must show a discovery of a valuable mineral deposit on the land for the mining claim to be valid. A discovery exists

[W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine Castle v. Womble, *supra* at 457; accord Chrisman v. Miller, 197 U.S. 313, 322 (1905); United States v. Coleman, *supra* at 602.

The prudent man rule has been refined to require a showing that the mineral in question can be extracted, removed, and presently marketed at a profit. The court in United States v. Coleman, *supra*, stressed that the prudent man rule and the marketability test are not two distinct standards, but are complementary. Present marketability can be demonstrated by a favorable showing of factors such as the accessibility of the deposit, *bona fides* in development, proximity to market, and the existence of a present demand. United States v. William A. McCall, Sr. et al., 2 IBLA 64 (March 22, 1971). It is also well-settled 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. See, e.g., United States v. G. C. (Tom) Mulkem, A-27746 (January 19, 1959), *aff'd* Mulkem 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 light of the foregoing, it is clear that appellants have failed to show they had discovered a valuable mineral deposit as of the crucial date of July 6, 1965, *i.e.*, that they, in fact, had established a market for the sale and disposal of gypsum from the mining claim as of that date. Although appellants disagree with the hearing examiner's conclusions, they have presented no evidence to substantiate their contentions that he erred in finding that no profitable market for the gypsum existed, and no support for their view can be found in the record.

Appellants admitted at the prehearing conference that no mining had been performed on the claim and that no sales of gypsum had been made. Since no actual mining operations had been conducted

on the claim and no commercial transactions were carried out in an attempt to market specific gypsum deposits from the Jeep No. 3 claim, appellants rely on the mere possibility of hypothetical future transactions that might have occurred if they had further developed their claim subsequent to the date of the withdrawal. This is a tenuous position which is grossly inadequate to establish the necessary fact of marketability. While the Department has never held that proof of actual sales is an indispensable element in establishing the marketability of a 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 of the withdrawal. See United States v. E. A. Barrows et al., 76 I.D. 299 (November 28, 1969), and cases collected therein, aff'd Esther Barrows v. Walter J. Hickel, Civil No. 70-215F, (D. Cal. April 20, 1970). Appellant's evidence, viewed at its best, shows no more than further development and market research were needed to obtain an outlet for their gypsum.

A brief review of the testimony of Albert B. Bartlett confirms the hearing examiner's conclusion that the gypsum on the Jeep No. 3 claim could not have been extracted, removed, and marketed at a profit as of the date of the withdrawal. Bartlett admitted on cross-examination that a market for the gypsum from the Jeep No. 3 claim did not exist at the time of the hearing, nor did one exist as of July 6, 1965. This, of itself, adequately supports the examiner's ruling. No existing open market for the gypsum was disclosed by the evidence. Appellants contend that the reason for not further testing the deposit or seeking to develop a market was their advance knowledge that the Army was going to take over the land. While such forbearance may have been prudent under the circumstances, we cannot assume inferentially that quality, quantity and marketability would have been conclusively established had appellants elected to proceed with a normal development program.

We can attribute little significance to appellants' bare reference to Exhibits J and K involving the patents of other gypsum claims in Colorado and Wyoming. Appellants do not explain how the circumstances of these other claims in other areas relate to the development of their own site. There was also no indication whether the development on the cited patented claims was similarly subject to a time limit imposed by an intervening withdrawal. The facts of these other gypsum claims, however, are not before us for consideration. Whether or not patents have properly issued on other gypsum claims, issuance of a patent in this case is not justified if appellants have not shown a valid discovery.

Appellants cannot prove marketability for their gypsum either by reference to other patented claims or by reference to the successful mining operations conducted by the Johns Manville Products Corp. and the Ideal Cement Company, located at Florence, Colorado, some 20 miles south of the claim. Testimony at the hearing established that neither of these users was in the market for outside gypsum as each had its own sources. Such references do not indicate that the Jeep No. 3 claim could have been successfully operated at a profit prior to July 6, 1965. To satisfy the marketability test appellants must have shown the existence of a demand for the material on their specific claim and not simply that the type of material in question is being utilized in the area. United States v. Harold Ladd Pierce, 75 I.D. 270 (1968); United States v. Everett Foster, 65 I.D. 1 (1958), aff'd in Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Lloyd Ramstad and Edith Ramstad, A-30351 (September 24, 1965); United States v. J. R. Osborne et al., 77 I.D. 83 (1970); United States v. William A. McCall, Sr. et al., supra. Appellants have not met this burden.

Finally, appellants' contention that the case law applied by the hearing examiner is limited to claims for material known as "common variety" covered by the act of July 23, 1955, 30 U.S.C. § 611 (1964), and therefore not applicable to their mining claim, is clearly erroneous. The "prudent man" test of discovery enunciated in Castle v. Womble, supra; Chrisman v. Miller, supra; Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335-336 (1963) has been universally accepted and applied by the Department as a test for discovery on all mining claims. Likewise, the Department, for many years prior and subsequent to the act of July 23, 1955, supra, has applied the test of marketability in determining whether or not various materials of widespread occurrence constituted "valuable mineral deposits" within the meaning of the mining laws. See, e.g., Layman et al. v. Ellis, 52 L.D. 714 (1929), and authorities cited; Big Pine Mining Corporation, 53 I.D. 410 (1931); United States v. Strauss, et al., 59 I.D. 129, 137 (1945); United States v. E. A. Barrows et al., supra. The ruling in Coleman, supra, approving the marketability test employed by the Department, is not restricted to those mineral deposits considered "common varieties." Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969).

Moreover, in its specific treatment of gypsum the Department has held that deposits of gypsum which could not have been marketed at a profit during the times when the lands containing the deposits were subject to location under the mining law are not valuable deposits within the mining law, and claims containing such deposits are properly declared null and void. United States v. G. C. (Tom) Mulkern, supra.

Accordingly, we conclude that the hearing examiner correctly found from the evidence that no discovery of a valuable mineral deposit had been made on the Jeep No. 3 placer mining claim prior to the date of the withdrawal of July 6, 1965.

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

We concur:

Joan B. Thompson, Member

Francis E. Mayhue, Member.

