

UNITED STATES

v.

GLEN S. GUNN ET AL.

IBLA 70-129

Decided September 15, 1972

Appeal from Office of Appeals and Hearings, Bureau of Land Management, affirming hearing examiner decision declaring mining claims null and void.

Affirmed as corrected.

Administrative Procedure: Generally -- Mining Claims: Discovery: Marketability

The marketability test, as developed by this Department and approved by the courts, is a complement to the prudent man test of discovery of a valuable mineral deposit under the mining laws, and publication of the test in the Federal Register is not a prerequisite to its validity.

Administrative Procedure: Generally -- Constitutional Law -- Mining Claims: Discovery: Marketability

The marketability test of discovery of a valuable mineral deposit under the mining laws does not violate due process

of law as being unconstitutionally vague, or as being unlawful administrative legislation.

Administrative Procedure: Generally -- Constitutional Law -- Mining Claims: Contests -- Rules of Practice: Government Contests

A mining claimant has not been denied due process when his claims are contested assertedly because a permit has been granted to a museum to perform archaeological work under the Antiquities Act, and where there was some pre! hearing newspaper publicity that the contest was being instituted but the claimant does not show that there was any unfairness in the contest proceeding itself.

Administrative Procedure: Burden of Proof -- Mining Claims: Contests -- Mining Claims: Discovery: Generally -- Rules of Practice: Evidence

A mining contestee is the true proponent under the Administrative Procedure Act that his claim is valid and, therefore, has the burden of overcoming the Government's prima facie case of no discovery with a preponderance of the evidence.

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

Common clays are not locatable under the mining laws. Only

deposits of clay of an exceptional nature which can be marketed for uses for which ordinary clays cannot be used are subject to such location.

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

A mining claim for a type of bentonite clay, which has not been adequately shown to be of a quality and quantity which can be marketed profitably for commercial purposes for which common clays cannot be used, is not valid.

Administrative Procedure: Decisions -- Mining Claims: Contests -- Rules of Practice: Appeals: Generally

A statement made in a Bureau appeal decision which does not accurately reflect one evidentiary fact does not establish that the decision's other findings were erroneous, and this Board will sustain the Bureau's determination that mining claims are invalid where the entire record supports that conclusion.

Mining Claims: Discovery: Generally

Evidence of mineralization which might warrant further exploration work within a claim rather than development of a mine is

not sufficient to constitute a discovery of a valuable mineral deposit.

Mining Claims: Discovery: Marketability

The marketability test of discovery is not satisfied by speculation that there might be a market at some future date.

Administrative Procedure: Decisions -- Administrative Procedure: Hearings -- Mining Claims: Hearing -- Rules of Practice: Appeals: Hearings

Under the Administrative Procedure Act the record made at a hearing constitutes the exclusive record for decision except to the extent official notice of facts may be taken. Further evidence presented on appeal after an initial decision in a mining contest may not be considered or relied upon in making a final decision, but may only be considered to determine if there should be a further hearing.

APPEARANCES: George W. Nilsson, Monta W. Shirley, attorneys for contestees-appellants. George H. Wheatley, Office of the Regional Solicitor, California, for the United States, contestant.

OPINION BY MRS. THOMPSON

This appeal in behalf of Glen S. Gunn, Julia D. Gunn, Hester L. Hamman Strahan, and Patricia Lee Kaer and Helen J. Brind, as heirs of Jobe L. Hamman, deceased, contestees, is from that part of a decision of the Chief, Office of Appeals and Hearings, Bureau of Land Management, dated February 13, 1970, affirming a hearing examiner's decision of May 28, 1969, declaring the Valley View Nos. 1 and 2 placer mining claims to be null and void. These claims are situated in section 22, T. 10 N., R. 2 E., S.B.M., in San Bernardino County, California.

The Government instituted the contest against these claims and six other claims by a complaint dated June 17, 1968, which was amended August 2, 1968, charging that: "Minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery." As to any other proceedings involving the lands, the amended complaint indicated that a permit dated May 1, 1968, had been granted to the San Bernardino County Museum pursuant to the Antiquities Act of June 8, 1906, 16 U.S.C. §§ 432, 433 (1970). It also indicated the lands embraced in the Valley View Nos. 1 and 2, Venus, North Star, G & H, and a portion of the lands within the Ann placer mining claims are included in a notice of proposed classification for multiple-use management. This classification, made pursuant to the Classification and Multiple-Use Act of September 19, 1964, 43 U.S.C. §§ 1411-1418

(1970), was to preserve the archaeological values in the lands and to segregate them from mining activity.

Basically, the hearing examiner found, and the Bureau affirmed that finding, that there was not a discovery of a valuable mineral deposit within the Valley View Nos. 1 and 2 mining claims. The appeal is concerned with the correctness of that determination. Before considering the issues raised by appellants, however, one point must be clarified. Appellants state in their appeal that the Bureau "confirmed" the examiner's decision concerning the Valley View Nos. 1 and 2 claims, but that it "reversed as to other claims." Actually, the Bureau set aside the examiner's decision only as to a finding by the examiner that parts of the Hester, Michael, Ann and Venus claims lying within 15 feet of each side and parallel to a certain road were abandoned. The Bureau's decision expressly affirmed the examiner's ruling that those parts of the Valley View No. 2, Venus, North Star, and G & H mining claims embraced within the SW 1/4 NW 1/4, NW 1/4 SW 1/4 sec. 22, T. 10 N., R. 2 E., are null and void ab initio as these lands were withdrawn from appropriation by Public Water Reserve No. 22 prior to the initiation of the claims, and have never been restored from the reserve. This determination as to the invalidity of the claims within the water reserve stands.

Many of the appellants' contentions were made to the Bureau and were adequately answered in the Bureau's decision which found

them generally to be without merit. We sustain the Bureau's responses to those contentions. In this appeal, appellants emphasize several arguments concerning the legal standards employed in the decisions below. They argue that the prudent man rule of Castle v. Womble, 19 L.D. 455, 457 (1894), was not appropriately followed here because the decisions indicated "marketability at a profit" was an inherent part of the prudent man test, which they dispute. They contend further that if the "marketability at a profit" test changes the prudent man test, it must be published in the Federal Register, and "since it has not been so published it is illegal and ineffective."

The marketability test has long been followed by this Department. See e.g., Layman et al. v. Ellis, 52 L.D. 714 (1929). The application of the test was expressly upheld in Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). It was further approved by the Supreme Court as a complement to the prudent man test in United States v. Coleman et al., 390 U.S. 599, 602 (1968), pointing out that "profitability is an important consideration in applying the prudent-man test." See also, Converse v. Udall, 399 F.2d 616, 621 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969), indicating that the marketability test is applicable to all mining claims including those containing precious metals, as previous court interpretations of the mining law and prudent man test were concerned with minerals "valuable in an economic sense." Id. at 622.

Since the marketability test has long been applied as a recognized standard before the Federal Register was established and is not a new substantive rule or statement of policy, there is no merit, in any event, to any argument that it must be published in the Federal Register to be effective. United States v. E. A. Barrows and Esther Barrows, 76 I.D. 299, 305 (1969), aff'd sub nom., Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971). Departmental decisions which cite the test are made available to the public in accordance with the Administrative Procedure Act, 5 U.S.C. § 552 (1970). Foster v. Jensen, 296 F. Supp. 1348 (D.C. Cal. 1966).

Furthermore, appellants' contention that the marketability test is unconstitutionally vague has no merit. The court decisions cited above belie this contention.

Appellants contend generally that the decisions below violate due process in several respects. First, they contend that they unlawfully attempt to legislate in that they amend the mining laws by prescribing additional requirements to constitute discovery. There is no merit to this contention. Appellants recognize the prudent man test of discovery in Castle v. Womble, supra, despite the lack of express statutory language employing the test. The necessity for administrative and judicial declarations of what constitutes a valid discovery because of the lack of explanatory statutory language has long been recognized. See, e.g., Chrisman

v. Miller, 197 U.S. 313, 321 (1905). Congress in its many deliberations concerning the mining laws has never seen fit to prescribe a different standard.

Appellants allege further they were denied due process because the contest was filed for the benefit of private persons and because of certain publicity concerning the contest proceeding before the matter was decided by the hearing examiner. They imply that because of this the examiner's determination could not be fair. We first point out that the United States may institute contest proceedings against mining claims simply to clear its title to the land without establishing any need or public project use for the land. Davis et al. v. Nelson, 329 F.2d 840, 846 (9th Cir. 1964). Cf. Palmer v. Dredge Corporation, 398 F.2d 791 (9th Cir. 1968), cert. denied, 393 U.S. 1066 (1969); and Dredge Corporation v. Penny, 362 F.2d 889 (9th Cir. 1966), where the land within mining claims contested by the Government was valuable for homesites and being sought for such by individuals. Therefore, it was proper for the Government to institute this contest proceeding, in any event, regardless of the interest of the local governmental agency interested in performing archaeological work within the claims. The fact a permit has been granted to the museum does not constitute a denial of due process to claimants. They were granted a hearing and full opportunity to present their case.

Appellants contend that there was nationwide publicity instituted by the Secretary of the Interior beginning in July 1968, concerning the contest proceedings and the archaeological site. They submitted as Exhibit A at the hearing a copy of a newspaper clipping of June 22, 1968, captioned "Dig Site Mining Claims Ruled Invalid". The article itself, however, reported that the claimants had the right to a hearing if they answered the "notice" (contest complaint) served upon them. Despite appellants' general allegations of lack of due process because of the prehearing publicity, they have shown no unfairness in the contest proceeding itself. The fact that the hearing examiner was an employee of the Department of the Interior does not by itself show that the contest proceeding was lacking in fairness fundamental to due process, as appellants imply. Cf. Converse v. Udall, 262 F. Supp. 583 (D.C. Ore. 1966), aff'd, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969). We see no denial of due process in these proceedings.

Appellants further contend, in effect, that the Government has the burden of proof as the proponent of a rule or order under the Administrative Procedure Act, 5 U.S.C. § 556(d) (1970), and the hearing examiner erred in ruling that the Government need only establish a prima facie case. Foster v. Seaton, supra, makes it clear that the true proponent is the mining contestee who alleges a valid discovery, and when the Government has presented a prima facie case, the

claimant has the burden to prove with a preponderance of the evidence that there has been such a discovery.

The significant issues in this case are whether there was a prima facie case established by the Government and whether the claimants met their burden of proof to establish a discovery of a valuable mineral deposit within the meaning of the mining laws.

Appellants' present appeal is concerned primarily with the principal material alleged to constitute a valuable mineral deposit within the claims, a type of bentonite clay. The Bureau held that the claimants failed to establish that the type of clay exposed on the claims is other than a common clay not locatable under the mining laws, and further it found that there was no evidence of a market for the clay, but only a hope that a market could be developed in the indefinite future.

Appellants contend that bentonite is not a "common variety" of mineral, and quote the regulation defining "common varieties" under section 3 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 611 (1970), which is now set forth at 43 CFR 3711.1(b). Although the decisions below found that the deposit was a common clay, they did not rule that the clay was no longer locatable under the mining laws because of section 3 of that Act which provided that a deposit of common varieties of sand, stone, gravel, pumice, pumicite, or

cinders, shall not be deemed a valuable mineral deposit within the meaning of the mining laws so as to give validity to any claim located after the Act. Rather, they relied on the ruling in United States v. Mary A. Matthey, 67 I.D. 63 (1960), and cases cited therein ^{1/} that common clays have never been locatable under the mining laws, instead only a deposit of clay of an exceptional nature which can be marketed for uses for which ordinary clays cannot be used may be located. Common varieties of clay are included in the category of material disposable by the United States under the Materials Act of July 31, 1947, 30 U.S.C. § 601 (1970). Appellant seems to be confusing common varieties under section 3 of the Surface Resources Act with the ruling reached below which found the deposit to be a common clay. Although many of the criteria in determining what constitutes a common variety under section 3 of the Act of July 23, 1955, as set forth in regulation 43 CFR 3711.1(b), are also applicable in determining whether a clay is locatable generally, the basis for the determination should not be confused.

Appellants cite definitions and discussions of bentonite generally in various texts to support their contention that it is a special clay because it has been classified as such. The fact that bentonite clay has been given a special name, as appellants contend, is not determinative. The evidence in this case did not cover all

^{1/} See also United States v. Nogueira, et al., 403 F.2d 816 (9th Cir. 1968), involving the same claim as that in the Matthey case.

types of bentonite, but was limited to the clay found on these claims. There is no factual basis in this case to make any general ruling concerning the locatability of all types of bentonitic clays. Our inquiry is limited to the clay deposit within these claims.

In reviewing the evidence in the record we agree with the decisions below that a prima facie case was established by the Government through the testimony of an expert witness who had examined the claims. He had tests performed on the clay found on the two claims and the tests showed that the clay did not meet commercial standards for certain uses for which some bentonite clays are suitable, such as for a bleaching clay for decolorization of crude oils (Tr. 33), or as a rotary drilling mud (Tr. 34-37). See also Tr. 44-46. He testified there were no valuable minerals found within the claims (Tr. 40).

The contestees did not present any evidence of tests to show that the clay could be suitable for uses for which common clays could not be used. At most, contestees' expert witness testified that the clay was a unique bentonite containing hectorite "in addition perhaps to montmorillonite" (Tr. 89). He testified that hectorite has been used to keep beer from going rancid (Tr. 90). However, there was no evidence that this clay deposit could be marketed for such a purpose. Instead, he recommended that this

clay could be used for pelletizing iron ores and that there was a possible market in Riverside County at the Kaiser Steel Plant (Tr. 90). Although he said he had made no tests of the bentonite on the claims, he stated he had tried it for pelletizing iron (Tr. 92). Pellets submitted as an exhibit (Contestees' Exhibit E), however, did not come from these claims (Tr. 96, 97). He testified there are no specific specifications for the clay to be used for pelletizing iron, "it is mostly by trial and error" and "has to be capable of agglomerating the particles" (Tr. 102). This testimony and his testimony that bentonite from these claims might be more competitive because of lower freight rates than that currently being used by Kaiser and that there might be more prospective purchasers of the material (Tr. 90, 91), was the most favorable evidence concerning this clay.

Most of his testimony, however, is actually more in the nature of advice for future work to be done on the claims and for investigating market possibilities. There is insufficient evidence that there is clay of a quality that can be marketed profitably for commercial purposes for which common clays cannot be sold. There is little concerning the quantity of clay within the claim that may be based on more than inference. Other than the discussion concerning freight costs, there is no evidence concerning the economic realities of a mining operation within the claims, such as evidence concerning possible prices for which the clay could be sold and possible costs

of a mining operation. Without an adequate showing that the clay is of a quality and quantity which can be marketed profitably for commercial purposes for which common clay cannot be sold, the claim is not a valid claim based on the clay alone. United States v. Mary A. Matthey, supra.

As to other mineral values within the claims, contestees tried to show values of gold and silver and there was testimony concerning agates and opals which might have a horticultural decorative use. None of the evidence was sufficient to show that there was a discovery of a valuable mineral deposit. We agree with one contention of appellant that the decision below should not have relied on a statement by the contestees' expert witness analyzing an assay for the metal values at two cents a yard. This statement, at Tr. 106, that "Mr. Gunn has an assay that goes to two cents a yard" followed a discussion concerning the fire assay method. The assay submitted in evidence by the contestees showed a combined value of gold and silver of \$ 4.79 (Tr. 60, 61, 106). This was by the fire assay method, however. It is apparent from the evidence that values shown by the fire assay method cannot be relied upon to establish the recoverable mineral values of an actual mining operation (see Tr. 104, 105). It is not clear whether the reference to the two-cent assay by the witness was to a different type of assay or, as appellants contend, that there was a typographical error in the transcript. The misconception by the Bureau of that one fact does

not establish that the decision's other findings were erroneous. This Board will sustain the Bureau's determination that mining claims are invalid where the entire record supports that ultimate conclusion.

In short, from our review of the entire record, there is little evidence to show that the claims were at anything more than the beginning of exploration work, and nothing to show that a valuable mine could be developed under the facts then known. Persuasive evidence of a valuable mineral deposit would prove minerals of a quality and quantity from which expected market price estimations might be made which could be compared with possible costs of the mining and marketing operation to establish whether a prudent man could expect to develop a valuable mine. See Adams v. United States, 318 F.2d 861, 870 (9th Cir. 1963).

At most, the contestees' evidence showed that they might be warranted in doing further exploratory work for the clay and the metals, and in doing further work to find a market for the clay. This, however, is not sufficient. Under the mining laws, a contestee must show more than evidence of mineralization which might warrant further exploration work within a claim; instead, the evidence shown must be sufficient to warrant a prudent man to go forward

with development work of a mine. See Converse v. Udall, *supra*. Speculation that there might be a market at some future date does not satisfy the marketability test. Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971). See also as to a clay deposit allegedly useful for certain industrial purposes, United States v. John B. Kathe, Jr., A-27744 (November 19, 1958).

Appellants have submitted an affidavit of Glen S. Gunn, making certain assertions concerning his assessment work on the claims in 1969 and 1970, and of his belief that the bentonite is of the highest grade. Under the Administrative Procedure Act, 5 U.S.C. §§ 556, 557 (1970), the record made at the hearing constitutes the exclusive record for decision except to the extent that official notice of facts may be taken. Further evidence presented on appeals after initial decisions have been rendered following a hearing may not be considered or relied upon in making a final decision. Such a tender of evidence may be considered only to determine if there should be a further hearing. United States v. Arch Little and Ethelyn Little, A-30842 (February 21, 1968).

Although additional evidentiary data has been filed with the appeal, appellants have not requested a further hearing, nor do we see any basis for any further hearing in this case. The lands have been segregated from mining since the proposed classification in

1968, therefore, evidence as to work performed since that time to try to establish the existence of a mineral deposit, if there were any basis for permitting reopening the hearing which there is not, would not be of significance to the question which has been decided that there was not a valid discovery as of the time the lands were segregated from appropriation under the mining laws. See Udall v. Snyder, 405 F.2d 1179 (10th Cir. 1968), cert. denied, 396 U.S. 819 (1969).

Accordingly, 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 as corrected above.

Joan B. Thompson
Member

We concur:

Frederick Fishman
Member

Martin Ritvo
Member

