

Editor's note: Appealed – reversed, Civ. No. 74-58-PCT-CAM (D. Ariz. July 10, 1975), rev'd, No. 77-3315 (9th Cir. Oct. 26, 1978) 588 F.2d 671

UNITED STATES
v.
ADRIAN EDWARDS

IBLA 72-84 Decided January 29, 1973

Appeal from a decision of Administrative Law Judge John R. Rampton holding that the Rock Quarry placer claim is null and void, and denying a mineral patent application therefor. (Cont. No. A-1643).

Affirmed as modified.

Mining Claims: Generally—Mining Claims: Determination of Validity—Mining Claims: Discovery: Marketability

The sale of minor quantities of material at a profit, or the disposal of substantial quantities of material at no profit, does not demonstrate the existence of a market for the material sufficient to establish the discovery of a valuable mineral deposit. Moreover, where the claim is a placer located for common building stone, it must be shown that the land was entered and was chiefly valuable for building stone prior to the time when such common varieties were closed to location by the Act of July 23, 1955.

APPEARANCES: Hale C. Tognoni, Esq., Phoenix, Arizona, for the appellant; Richard L. Fowler, Esq., Office of the General Counsel, Department of Agriculture, Albuquerque, N.M., for the appellee.

OPINION BY MR. STUEBING

This is an appeal from decision of the Administrative Law Judge rendered on August 16, 1971, holding that the Rock Quarry placer mining claim, situated in the Coconino National Forest on Lots 9 and 10, section 19, T. 17 N., R. 5 E., G.&S.R.M., Yavapai County, Arizona, is null and void, and rejecting appellant's application for a mineral patent.

Appellant is trustee for the real party in interest, Ross Stegman. Evidence adduced at the hearing indicates that Stegman,

his wife, son and daughter entered the subject land, or a portion of it, in 1949 and erected certain monuments as corner markers. However, no location notice was recorded until January 16, 1956, when Stegman filed a location notice for a lode claim embracing 20.58 acres. Affidavits of labor for the lode claim were filed in 1958 and 1962. In 1964 the Government filed contest proceedings (Contest No. AR-034374) against the lode claim, at which time Stegman first learned that his claim should have been filed as a placer rather than a lode. Thereafter, pursuant to advice of counsel, Stegman filed a stipulation in the contest proceeding in which he declared that he thereby "abandons the Rock Quarry lode mining claim location notice and stipulates that he gained no mineral rights thereunder," whereupon the contestant agreed to withdraw the contest.

Pursuant to this agreement the Hearing Examiner, without conducting a hearing, rendered a decision on March 15, 1966, accepting the stipulation, declaring the Rock Quarry lode mining claim abandoned and the contest closed. Under the then prevailing procedure Stegman appealed from the Examiner's decision to the Director, Bureau of Land Management. It was Stegman's contention on appeal that he had not expressed an abandonment of the claim, he had merely abandoned the location notice. The Bureau decision held that the language employed in the stipulation by Stegman was tantamount to a withdrawal of the answer he had filed to the complaint and an admission of the charges, and affirmed the Examiner's decision. United States v. Ross Stegman, Contest 034374 (Arizona) (May 15, 1967). This decision in turn appealed by Stegman to the Secretary of the Interior, and was again affirmed. Ross Stegman, A-30812 (November 21, 1967). Stegman then filed for judicial review in the District Court, contending that he had abandoned only the rights he might have gained under the location notice filed pursuant to 30 U.S.C. 26 and not those rights gained under 30 U.S.C. 38, the "adverse possession statute." The Court held that the pleadings raised issues of fact and law upon which no evidence had been taken, and remanded the case to the Bureau of Land Management for further proceedings. Stegman v. Udall, Civ. No. 6953 Phx. CAM (D. Ariz. Dec. 12, 1969).

In August 1966, while the appeal from the Examiner's decision was pending, Stegman and the three other members of his family filed a location notice of an association placer claim covering 71.37 acres of land in the same section and embracing the 20.58 acres which had previously been covered by the lode claim. This notice stated that the locators "came onto this ground in January 1953 and operated under Section 38 Title 30, U.S.C. as a stone quarry."

We cannot avoid the observation that this statement is inconsistent with subsequent allegations that Stegman and his family actually made a mining entry on this land in 1949.

An amended notice of placer location containing the same statement was filed of record on January 17, 1968. This notice showed Adrian Edwards in the capacity of "Trustee." It is not apparent whether Mrs. Edwards is trustee for the interests of Ross Stegman only, or for all of the Stegmans who were associated as co-locators of the Rock Quarry placer claim.

Mrs. Edwards filed mineral patent application A-01643, claiming the right to receive a patent to the 71.37 acres allegedly located by Stegman and members of his family on the basis of their use and occupancy of the land pursuant to 30 U.S.C. 38 (1970), which provides:

Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under sections 21-24, 26-30, 33-48, 50-52, 71-76 of this title, in the absence of any adverse claim; . . .

Section 12-525, Arizona Revised Statutes, provides:

- (A) An action to recover real property from a person in peaceable and adverse possession, and cultivating, using or enjoying the property, and paying taxes thereon, and claiming under a deed, or deeds duly recorded, shall be commenced within five years after the cause of action accrues, and not afterward.

On April 29, 1969, a new contest (Contest No. A-1643) was initiated at the request of the Forest Service, charging that:

- a. A valid mineral discovery as required by the mining laws of the United States does not exist within the limits of the Rock Quarry placer mining claim.
- b. The materials found within the limits of the claim are not valuable mineral deposits under 30 U.S.C. 611.

- c. The land embraced within the claim is nonmineral in character within the meaning of the mining laws.
- d. The claim is not marked on the ground so that the boundaries can be readily traced.
- e. The claimant has no rights under 30 U.S.C. 38.

At the hearing evidence was adduced to show that Stegman entered and occupied the land in 1949. The land contains deposits of sand, gravel and stone, ranging in quality from rubble to a relatively good quality flagstone. These materials have been used as leach lines for septic systems, road base, retaining walls, fill, walks and patios, floors, veneer and facings. The rock was sold for \$6 to \$14 per ton and the sand and gravel was sold for \$.10 per yard. Stegman allowed the removal of some substantial amounts of material without charge. He also allowed material to be removed in exchange for the development work done. Testimony was given that there have been some sales every year since 1949.

Despite some testimony to the contrary, the Judge found that all of the mineral materials are devoid of unique properties giving them a distinct and special value and are, therefore, common varieties which have been closed to mineral location since July 23, 1955. 30 U.S.C. 611 (1970). We concur in this finding.

The Judge held further that whatever right Stegman earned under 30 U.S.C. 38 through his occupancy of the claim for the period established by the State's "adverse possession" statute, that right was lost when Stegman filed his notice of lode location. The Judge based his holding on theory that possession of a mining claim pursuant to a location notice and possession under the "adverse possession statute" are mutually exclusive, so that in filing his location notice Stegman was making an election to assert his claim under 30 U.S.C. 26 and to relinquish whatever right he had acquired up to that point through compliance with 30 U.S.C. 38 and the Arizona "adverse possession" statute. The Judge then held that the relinquishment of the lode claim and the subsequent relocation of the larger area as a placer claim availed the locators nought, because these actions were taken after the time when such common varieties of mineral materials were closed to location by the Act of July 23, 1955, supra, the claim, therefore, being null and void ab initio. He concluded, in effect, that the claimants have no legal basis on which to assert a claim.

At the hearing, in the Judge's decision, and in the briefs submitted in connection with this appeal, considerable attention was devoted to the legal effect of the Stegmans' occupation of the land, the filing of the lode claim location notice, its abandonment, the relocation of the land as a placer claim and the enactment of the law excluding common varieties of mineral materials from location. While we entertain some doubt as to whether this portion of the rationale in the Judge's opinion is entirely correct, we need not decide, since the case may be resolved on a more elemental issue, *i.e.* the issue of discovery.

In his decision the Judge noted that regardless of the date when Stegman may be found to have initiated his present claim to title, and regardless of the statute under which he may elect to assert his right, the claim is invalid for the reason that there has been no discovery of a valuable mineral deposit. The following finding is noted in the opinion:

Mr. Ross Stegman testified that he has quarried and sold building stone and flagstone from his claim and has sold sand and gravel from his claim from 1949 until the present time. His testimony on sales was based solely on memory and rough estimates for he had few receipts. His testimony shows:

<u>Date</u>	<u>Rock</u>	<u>Sand and Gravel</u>
1949	\$100	\$8.00
1950	140	9.40
1951	175	6.40
1952	250	16.00
1953	100	46.40
1954	100	3.80
1955	<u>100</u>	<u>9.40</u>

TOTAL \$965 \$99.40

Thus, from 1949 through 1955 and prior to the enactment of Public Law 167 (or July 23, 1955), he received a total of \$1,064.40 from sales of sand and gravel and rock from the claim.

Stegman further testified as follows on direct examination:

Q. Now, from '49 to '55, did you operate each year?

A. Yes, sir.

Q. Did you sell stone each year?

A. Sold some, I sold rock, I would say. I don't think I missed a year selling a few rocks, maybe a load, say a load, what we call a load, pickup load, to somebody who comes along, most people I never did see before, and they come after rocks. People bought in those places there around Sedona through those holes and hollows, they want to fill in, you know, build walls. (Tr. 266).

We agree that this record of sales is inadequate to indicate that a "valuable mineral deposit" within the context of 30 U.S.C. 22 (1970) had been discovered. The receipts each year were barely sufficient to equal the expenditure required for assessment work, with a few dollars more for the four locators. The figures represent gross receipts. No costs were given, and the net profit, if any, was not stated.

Donald Reed, a mining engineer, who testified as an expert witness for the contestee stated that the claim lies "right alongside a paved highway and only about six miles from the principal market there in Sedona and very easily accessible." (Tr. 333).

The appellant testified, "The fact is when I worked in the post office, there were 87 people, counting the babies, getting mail at the Sedona post office . . ." (Tr. 171).

While other testimony indicated that the population of Sedona has increased somewhat in recent years, there is nothing that suggests that prior to July 23, 1955, the town, as the "principal market" for the material from this claim could conceivably generate sufficient demand for such materials to justify a prudent man in the reasonable anticipation that a valuable mine could be developed. Castle v. Womble, 19 L.D. 455 (1894). Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. United States v. Coleman, 390 U.S. 599 (1968). Stegman did not quarry or load all of the material he sold; he frequently left that to his customers, who in many cases merely paid him for the right to enter the premises and take it. (Tr. 215, 255, 256, 264). Although he did maintain a few small stockpiles of stone, his record of sales makes it clear that it would not have been prudent for him to expend his labor and means to quarry substantial amounts.

Stegman's residence has been on the claim since sometime in 1953. Although there is no prohibition against a claimant residing on his claim, under the mining laws Congress has made public lands

available to people for the purpose of mining valuable mineral deposits and not for other purposes. United States v. Coleman, supra.

The statute which authorized the location of placer claims for building stone limits such mineral entry to "lands that are chiefly valuable for building stone . . ." 30 U.S.C. 161 (1970). Although Reed testified on behalf of the contestee that in his opinion the land is chiefly valuable for building stone, we question this opinion in light of the fact that the gross receipts from the sales of sand, gravel, and stone averaged only \$152 per year for the years 1949 through 1955. This is a gross return of about \$2.00 per acre, per annum over the seven-year period. However, since this is not the controlling issue, we need not decide it.

As Judge Rampton points out in his decision, this Department has held that the sale of minor quantities of material at a profit, or the disposal substantial quantities at no profit, does not demonstrate the existence of a market for the material found on a particular mining claim which would induce a man of ordinary prudence to expend his means in an effort to develop a valuable mine on the claim. United States v. Amos D. and Lena S. Robinette, A-31133 (March 4, 1970); United States v. John C. Chapman et al., A-30581 (July 16, 1968); William M. Hinde et al., A-30634 (July 9, 1968); United States v. Joe H. York et al., A-28806 (August 16, 1962).

We agree, therefore, that the evidence is not sufficient to establish the existence of a demand for the material from the Rock Quarry Placer claim prior to July 23, 1955, and, consequently, no discovery of a valuable mineral deposit has been demonstrated.

Finally, in the absence of a qualifying discovery no rights under 30 U.S.C. 38 can accrue. Cole v. Ralph 252 U.S. 286 (1919); United States v. Charles W. Kohl, et al., 5 IBLA 298 (1972).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as herein modified.

Edward W. Stuebing, Member

We concur:

Martin Ritvo, Member

Anne Poindexter Lewis, Member

