

Editor's note: Appealed -- aff'd, Civ. No. 75-M-786 (D.Colo. Sept. 2, 1976), aff'd, No. 76-2035 (10th Cir. Jan. 18, 1979), 590 F.2d 852

UNITED STATES
v.
C. V. HALLENBECK, ET AL

IBLA 75-364

Decided August 11, 1975

Appeal from decision of Administrative Law Judge Harvey C. Sweitzer declaring seven placer mining claims null and void. Contest No. C-476.

Affirmed.

1. Mining Claims: Discovery: Generally

A discovery of a valuable mineral deposit has been made where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine.

2. Mining Claims: Common Varieties of Minerals: Generally

Where claims were located for common varieties of sand and gravel as well as other minerals prior to July 23, 1955, it must be shown that because of proximity to market, bona fides in development, the existence of present demand, and other relevant factors, the sand and gravel together with the other minerals could have been sold at that time for a reasonable profit. In the absence of such a showing, the value of the sand and gravel may not now be considered in determining whether a discovery of

a valuable mineral deposit has been made, as the value of a nonlocatable deposit may not be added to that of a locatable deposit to establish a discovery.

3. Mining Claims: Common Varieties of Minerals: Generally -- Mining Claims: Discovery: Marketability -- Rules of Practice: Evidence

A lack of sales of a mineral of wide-spread occurrence, such as sand and gravel, may raise a presumption that there was no demand for the mineral during that time, and, hence, the material was not marketable. The presumption may be overcome with credible evidence to the contrary or by bona fides in development.

4. Administrative Procedure: Burden of Proof -- Mining Claims: Contests

When the Government contests a mining claim on a charge of no discovery, it bears the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that a discovery has been made.

5. Administrative Procedure: Burden of Proof -- Mining Claims: Contests

Where a Government mineral examiner testifies that he has examined a claim and found the mineral values insufficient to support a finding of discovery, a prima facie case of invalidity has been established. Government mineral examiners are not required to perform discovery work for claimants or to explore beyond a claimant's workings.

6. Mining Claims: Hearings -- Rules of Practice: Evidence

Evidence tendered on appeal from an adverse decision in a mining claim contest cannot be considered except for the limited purpose of deciding whether a further hearing is warranted. However, such evidence will only be considered if accompanied by a cogent explanation of why it was not tendered at the hearing.

APPEARANCES: C. V. Hallenbeck, Jr., for appellants; Oscar H. Doyle, Esq., Office of the General Counsel, United States Department of Agriculture, Denver, Colorado, for appellee.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Charles V. Hallenbeck, Jr., et al., 1/ appeal from the January 27, 1975, decision of Administrative Law Judge Harvey C. Sweitzer declaring seven placer mining claims 2/ null and void. The proceedings in this case commenced with the issuance of complaint by the Colorado State Office, Bureau of Land Management (BLM). That complaint was issued at the request of the Forest Service and charged that: 1) there has been no discovery of a valuable mineral deposit on the claims, and 2) the ground on which the claims are located is nonmineral in character. A hearing on the charges was held in Denver, Colorado, in March 1974. As a result of the evidence taken at the hearing, Judge Sweitzer issued his decision of January 27, 1975, declaring all of the claims null and void for lack of discovery of a valuable mineral deposit. Appellants attack that conclusion on two different bases. First, they argue that the Forest Service failed to make a prima facie case that the claims are invalid. Second, they assert that they have proved by a preponderance of the evidence that they have discovered a valuable mineral deposit. In addition, appellants state that they have discovered evidence since the hearing which will show that the claims are valid.

1/ The parties who responded to the original complaint are C. V. Hallenbeck, Jr. and Clyde Hallenbeck, for both themselves and for a trust which owns most of the estate of C. V. Hallenbeck, Sr.

2/ The seven claims are the Harlan, Hidden, Kansgen, Good Bet, Connecting Link, Elk Park, and Hallenbeck, located in sections 7 and 8, T. 11 S., R. 80 W., 6th P.M., and sections 1 and 12, T. 11 S., R. 81 W., 6th P.M., Colorado.

[1] The Department of the Interior defined discovery of a "valuable mineral deposit" within the context of the general mining law, 30 U.S.C. § 22 et seq. (1970), in the seminal case, Castle v. Womble, 19 L.D. 455, 457 (1894):

[W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

That definition, known as the "prudent man test," has received the continuing approval of the Supreme Court. Chrisman v. Miller, 197 U.S. 133, 322 (1905); Cameron v. United States, 252 U.S. 450, 459 (1920); Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335 (1963). The Department of the Interior has supplemented the prudent man test with a requirement of marketability, that is, the mineral must be capable of extraction, removal, and marketing at a reasonable profit. In approving the marketability requirement, the Supreme Court characterized the marketability test as a "logical complement" to the prudent man test. United States v. Coleman, 390 U.S. 599, 603 (1968). It appears that the claims were originally located for gold, and were examined as such by contestant's mineral examiners. However, it later developed that the claimants also assert that the claims are valuable for sand and gravel. We will discuss the sand and gravel first.

[2-3] All the claims in question were located before 1955 and contain large amounts of sand and gravel. If the sand and gravel on those claims are common varieties of those materials, the value of the sand and gravel may be considered only if such were marketable prior to July 23, 1955. Common varieties of sand and gravel have not been locatable since that date. 30 U.S.C. § 611 et seq. (1970). The value of nonlocatable minerals may not be added to that of associated minerals which are locatable in determining whether discovery of a valuable mineral deposit has been made. United States v. Lease, 6 IBLA 11, 20-21, 79 I.D. 379, 383-84 (1972); United States v. Mt. Pinos Development Corp., 75 I.D. 320, 328-29, (1968); United States v. Basich, A-30017 (September 23, 1964). To show that the sand and gravel on these claims was marketable prior to July 23, 1955, the date of enactment of the Surface Resources Act, 30 U.S.C. § 611 et seq. (1970), appellants must show "* * * that by reason of accessibility, bona fides in development, proximity to market, existence of present demand [at that time], and other factors, the deposit is of such value

that it can be mined, removed, and disposed of at a profit." Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959); Osborne v. Hammit, 377 F. Supp. 977, 985 (D. Nev. 1964). Proof of lack of sales prior to July 23, 1955, will raise a presumption that the material was not marketable at a profit on that date. United States v. Taylor, 19 IBLA 9, 19, 82 I.D. 68, 71 (1975). That presumption can be overcome by a preponderance of evidence to the contrary. United States v. Gibbs, 13 IBLA 382 (1973). If, on the other hand, appellants assert that the sand and/or gravel are not common varieties of that material, they must show that the sand and gravel have a unique property giving it a special and distinct value, which value is reflected in either a substantially higher market price or certain other economic advantages when compared to common varieties of those materials. United States v. McClarty, 17 IBLA 20, 81 I.D. 472 (1974).

[4, 5] When the Government contests a mining claim on a charge of no discovery, it bears the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that a discovery has been made. Foster v. Seaton, *supra*; United States v. Springer, 491 F.2d 239, 242 (9th Cir. 1974); United States v. Zweifel, 508 F.2d 1150, 1157 (10th Cir. 1975). The Government has established a prima facie case when a mineral examiner testifies that he has examined a claim and found the mineral values insufficient to support a finding of discovery. United States v. Ramsey, 14 IBLA 152, 154 (1974); United States v. Bloomquist, 7 IBLA 351 (1972). It is true that the mineral examiner's conclusion must be based on reliable, probative evidence. United States v. Winters, 2 IBLA 329, 335, 78 I.D. 193, 195 (1971). But Government mineral examiners are not required to perform discovery work, to explore or sample beyond the claimants workings, or to conduct drilling programs for the benefit of claimants. United States v. Ramsey, *supra*; United States v. Wells, 11 IBLA 253 (1973); United States v. Grigg, 8 IBLA 331, 343, 79 I.D. 682, 688 (1972).

At the hearing, the Forest Service mineral examiner, Warren Roberts, testified that he had examined the claims on several different occasions. He took samples from exposed workings on six of the seven contested claims. He was unable to find any sign of workings on the seventh claim. An average of the value of all the samples based on the price of gold at the time of the hearing, \$178.25 per ounce, ^{3/} yields a result of less than 6¢ of gold per cubic yard. (Ex. 3-8, Tr. 40-41). Based on his sampling, the

^{3/} The present market price for gold is somewhat less.

mineral examiner testified that there has been no discovery on the claims, as no prudent man would expend further time and effort in an effort to develop the claims (Tr. 42). In light of the associated labor and capital costs, we agree that no prudent man would undertake development of a mining claim unless the showings were far superior to these.

The evidence introduced by the contestees to rebut the Government's prima facie case tends to confirm the conclusion of the mineral examiner that no discovery has been made. We note that all of the samples introduced by the contestees were taken from only two claims; six samples were taken from the Good Bet claim and one was taken from the Elk Park claim. ^{4/} Both the Good Bet and the Elk Park claims, plus a third claim, the Hallenbeck, were segregated from further mineral entry on June 4, 1969, when an application for withdrawal of land was filed with the BLM. United States v. Foresyth, 15 IBLA 43 (1974). While samples could still be taken after June 4, 1969, the date of segregation of the land from further mineral entry, such samples can only be given weight to the extent that they confirm the existence of a discovery prior to that date. United States v. Gunsight Mining Co., 5 IBLA 62, 64 (1972). For that reason, the value of gold contained in the samples is based on the price of gold when the claims were withdrawn from further mineral entry. The price of gold at that time was \$39 per troy ounce. A claim which is invalid at the time the land is closed to mining location cannot thereafter become valid simply because the market value of the mineral has since increased. United States v. Winegar, 16 IBLA 112, 128, 81 I.D. 370, 377 (1974). C. V. Hallenbeck, Jr., testified that his father had said that if the price of gold reached \$100 per ounce, they would "start up the placer." Clearly, this means that he considered it imprudent to attempt to mine these claims when the price of gold was \$39 per ounce. And yet, no discovery could be made on the Good Bet, Elk Park and Hallenbeck claims after June 4, 1969, when the land was closed to location by the filing of the withdrawal application. The value of seven of the samples taken by contestees, assuming a price of \$39 per ounce of gold, ran 1¢ to 2¢ per ton of material and an eighth sample ran 27¢ per ton. Even if the samples were to be given the value of gold as of the time of the hearing, \$178.25 per ounce, they would simply confirm the mineral examiner's finding. The value of gold in seven samples ranged from 2¢ per ton to 10¢ per ton. (Ex. G). In an eighth sample, the value was \$1.25 per ton. (Ex. F). That sample is simply anomalous,

^{4/} An eighth sample was taken from a claim not involved in these proceedings.

and without further samples, indicates no consistent values. Furthermore, we note that the appellants did not know the weight of the samples they took. That factor alone negates the probative value of the samples. ^{5/}

With respect to the sand and gravel on these claims, appellants conceded that none of it has ever been sold. Clyde Hallenbeck did state that his father had a going sand and gravel business prior to and after 1955, selling sand and gravel to Climax Molybdenum Company and the Colorado State Highway Department. (Tr. 193-203). However, that sand and gravel came from other claims, and appellants have offered no evidence that they could have sold sand and gravel from these claims in addition to the sand and gravel from the other claims. In short, they have failed to show that there was a market (or demand) for more sand and gravel than they were already producing. Since appellants have not shown that a market exists for their material either before or after 1955, whether it is a common variety is irrelevant. However, the evidence does show that the material is a common variety of sand and gravel, and, consequently, not locatable. No unique quality has been urged for this sand and gravel that would render it uncommon. See the discussion in United States v. Guzman, 18 IBLA 109, 124, 81 I.D. 685, 692-93 (1974).

[6] Finally, appellants state in their brief that they have discovered new evidence that the sand and gravel on their claims is both valuable and unique and has been so recognized by an agency of the Government. However, no evidence has been submitted to support that assertion. The Department's policy has been that evidence tendered on appeal from a mining contest may not be considered except for the limited purpose of deciding whether there is any justification for ordering a further hearing, since the record made at a hearing must be the sole basis for decision. United States v. Gunn, 7 IBLA 237, 253, 79 I.D. 588, 595-96 (1972). However, such evidence will not be accepted in the absence of a cogent explanation why it could not be adduced when the case was heard. United States v. MacIver, 20 IBLA 352, 358 (1975). As appellants have submitted nothing in support of their assertions, we decline to order further hearings.

^{5/} Appellants also indicated at the hearing that they believed the claims to be valuable for silver and platinum. Their own samples show no platinum and a negligible amount of silver. (Ex. O).

Therefore, 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.

Edward W. Stuebing
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Martin Ritvo
Administrative Judge

