

UNITED STATES
v.
CLARE WILLIAMSON AND
LAPINE PUMICE CO.

IBLA 77-319

Decided February 4, 1980

Appeal from decision of Administrative Law Judge Robert W. Mesch declaring four placer mining claims invalid for lack of discovery (Contest Nos. Oregon 011735 and Oregon 6115).

Affirmed in part; reversed in part.

1. Mining Claims: Contests -- Mining Claims: Lands Subject to -- Mining Claims: Location -- Mining Claims: Withdrawn Land

A Forest Service special use permit issued to a state agency does not constitute a withdrawal of the land involved from appropriation under the mining law, and a contest will not lie against a subsequently located mining claim on a charge that a portion of the claim is void to the extent that it includes land embraced by the permit.

2. Mining Claims: Discovery: Generally -- Mining Claims: Discovery: Marketability

A discovery of valuable minerals under Federal mining laws exists only where the

minerals found are 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. Discovery requires a showing that the mineral can be presently extracted, removed, and marketed at a profit.

3. Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally -- Mining Claims: Withdrawn Land

When land is withdrawn from location under the mining laws subsequent to the location of a mining claim, the claim must be supported by discovery at the date of withdrawal to be valid.

4. Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally

If a mining claimant locates a group of claims, he must establish discovery for each claim that he seeks to validate.

5. Administrative Procedure: Burden of Proof -- Evidence: Preponderance -- Evidence: Prima Facie Case -- Mining Claims: Contests -- Mining Claims: Determination of Validity

Where the Government contests mining claims on a charge of lack of discovery of a valuable mineral deposit prior to the date when such minerals were no longer subject to location, the claimant, as proponent of the rule, has the ultimate burden of proof as to validity of the claim. The Government, however, must initially present sufficient evidence to establish a prima facie case. The burden then shifts to the claimant to show by a preponderance of credible evidence that a discovery has been made on each claim.

6. Evidence: Generally -- Evidence: Burden of Proof -- Mining Claims: Contests -- Mining Claims: Hearings -- Rules of Practice: Evidence -- Rules of Practice: Government Contests

In determining the validity of a mining claim in a Government contest, the entire

evidentiary record must be considered. If the Government fails to make a sufficient prima facie case against a mining claim, the claimant may move to have the contest dismissed and rest his case. However, when the claimant goes forward with his evidence, the Administrative Law Judge must consider the evidence presented and weigh it in accordance with its probative value. In choosing to rebut the case, the claimant bears the burden of doing so by a preponderance of the evidence and bears the risk of nonpersuasion if he fails.

7. Mining Claims: Discovery: Marketability

Although a favorable showing of actual sales may demonstrate marketability, lack of sales is not necessarily conclusive on the issue of marketability. Lack of sales may be overcome, after all the evidence is heard, by a preponderance of the evidence showing that a prudent person could have extracted and marketed the mineral profitably.

8. Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally -- Mining Claims: Mineral Lands

Land is mineral in character when known conditions engender the belief that the land contains mineral of such quantity and quality as to render its extraction profitable and justify expenditures to that end. The charge that the lands embraced by a mining claim are not mineral in character can raise two discrete issues. First, it can challenge the validity of the entire claim. Alternatively, it can be applied to placer claims which are supported by a discovery, with the effect that the claimant must show that each 10 acres of the claim are mineral in character.

9. Mining Claims: Determination of Validity -- Mining Claims: Excess Reserves

The charge of invalidity due to the presence of excess reserves admits that the mineral,

qua mineral, exists within additional claims, but raises the contention that because of the quantity of mineral present in unchallenged claims owned by the mineral claimant, the mineral in the challenge claims would have no market and thus is essentially valueless.

10. Mining Claims: Contests -- Rules of Practice: Government Contests -- Rules of Practice: Hearings

In a mining contest, a matter not charged in the complaint cannot be used as a ground to invalidate a claim, unless it has been raised at the hearing and the contestee has not objected.

11. Mining Claims: Determination of Validity -- Mining Claims: Discovery: Marketability -- Mining Claims: Withdrawn Land

A valid mining claim for lands previously withdrawn from location must be supported by discovery as of the date of withdrawal and a showing that marketability has continued since discovery and the minerals can presently be profitably extracted.

APPEARANCES: Edward L. Fitzgibbon, Esq., and James W. Morrell, Esq., Fitzgibbon and Morrell, Portland, Oregon, for appellants; Arno Reifenberg, Esq., Regional Attorney, U.S. Department of Agriculture, Portland, Oregon, for appellee.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Clare Williamson and the LaPine Pumice Company appeal from the March 30, 1977, decision of Administrative Law Judge Robert W. Mesch which declared four placer mining claims in Deschutes County, Oregon,

invalid for failure to establish timely discovery. The decision followed a hearing in 1976 on two cases, Oregon 011735 and Oregon 6115, which had been consolidated for review. ^{1/}

The four mining claims were originally located for lump pumice by Lloyd Williamson in association with several other persons. The co-locators subsequently conveyed their respective interests in the claims to Williamson, and Clare Williamson inherited her husband's interest upon his death in 1958. She is presently the sole owner of the four claims. LaPine Pumice Company has a leasehold interest in the claims.

Judge Mesch described the history of these claims at length in his opinion and we include portions of that description here as background for the case.

Oregon 011735 has been pending before the Department since at least June 26, 1963, when a complaint was filed at the request of the Forest Service, challenging the validity of the major portion of Claim No. 2. The Forest Service did not question the validity of the claim as to approximately 17 acres in what has been designated as the east half of Lot 6. The Government's evidence at the 1964 hearing was directed toward showing

^{1/} The mining claims are identified in the record and this opinion as Claim Nos. 1-4. Claim No. 2 is at issue in Oregon 011735 and Claim Nos. 1, 3, and 4 are at issue in Oregon 6115. The claims are located within the Deschutes National Forest about 40 miles south of Bend, Oregon, on lands withdrawn from mining location by the Act of December 21, 1945, 59 Stat. 622. Claim Nos. 1, 2, and 3 are contiguous and Claim No. 4 is a short distance to the south. Each claim covers approximately 160 acres.

that the uncontested portion of the claim contains lump pumice in sufficient quantity to satisfy the demand for the mineral from the claim for a reasonable period in the future and the remaining portions of the claim are not valuable for the pumice which they contain because there is no market for it. The mining claimant's evidence was directed toward demonstrating the marketability of the pumice found on the claim and toward refuting the Government's showing of abundant reserves on the uncontested portion of Lot 6. The only issue for determination was whether the contested portions of the claim were invalid under a theory of excess reserves which made the land nonmineral in character.

By a decision dated January 6, 1965, the Hearing Examiner dismissed the complaint upon finding that: (1) the evidence, as well as admissions of the Forest Service, established a discovery of a valuable mineral deposit within the uncontested portion of the claim; (2) lump pumice was found on each subdivision of the claim sufficient to qualify the land as mineral in character; and (3) the Government's argument was not convincing that there is no present or prospective market for the pumice within the contested portions of the claim because of the quantity of pumice within the uncontested portion of the claim.

The Forest Service appealed to the Director, Bureau of Land Management. Among other things, the Forest Service suggested that its original determination that the east half of Lot 6 met the requirements of the mining laws may have been questionable. In a decision of March 31, 1966, the Office of Appeals and Hearings found the evidence unconvincing that there was a discovery of valuable minerals on the claim prior to the time the land was withdrawn from mining location by the Act of December 21, 1945. The lack of evidence on the issue of discovery, it surmised, was possibly due to the failure of the Forest Service to charge lack of discovery on the east half of Lot 6. The Office of Appeals and Hearings concluded that the complaint was erroneously drawn, inasmuch as a correct finding with respect to discovery was indispensable to a proper determination of the validity of the claim. It remanded the case for a hearing on the issue of whether a discovery of valuable minerals was made on the claim prior to the 1945 withdrawal.

The mining claimant appealed to the Secretary of the Interior. She complained, among other things, that

the Forest Service had recognized there was a valid discovery on the east half of Lot 6 and the only issue before the Director was whether the Hearing Examiner's decision concerning the mineral character of (or excess reserves in) the contested portions of the claim was supported by substantial evidence. In a decision dated October 23, 1968 (75 I.D. 338), the Assistant Solicitor ruled that the Department was not precluded from inquiring into any question vital to the determination of the validity of a mining claim and the case presented the occasion for the exercise of the Department's plenary authority.

This decision raised a new issue. The Assistant Solicitor commented:

Contestant's efforts at the hearing were directed to showing that at that time the uncontested portion of lot 6 contained such a large tonnage of marketable lump pumice as to make the lump pumice on the contested portions of the claim valueless. Appellant, on the other hand, attempted to deprecate the amount of pumice on the uncontested portion of lot 6 so as to establish the marketability of the pumice on the contested portions of the claim. Neither party attempted to establish the existence or nonexistence of lump pumice in each 10-acre subdivision of the claim as of December 21, 1945, in such quantity as would render its extraction profitable and justify expenditures to that end. (p. 345)

The Assistant Solicitor summarized the testimony of a Forest Service mining engineer relating to the excess reserve contention. He noted that the mining engineer's estimates of tonnage were based upon conditions observed at the time of his examinations of the claim between 1961 and 1964 and that practically all of the conditions relied upon were nonexistent in 1945. He concluded that the evidence left wholly unanswered the question as to whether an estimate of the quantity of useable pumice on the claim could have been made upon the basis of evidence discernible in 1945. He noted that the testimony of the Forest Service mining engineer suggested such an estimate could not have been made.

The Assistant Solicitor found that the mining claimant did nothing to supply the want of evidence of a basis

for any inference in 1945 of the quantity of useable pumice on the claim. He stated that the testimony of expert witnesses for the mining claimant on the question of the quantity of pumice present on the claim was to the effect that an estimate of the tonnage of commercial lump pumice could not be made even upon the basis of data available [sic] at the time of the hearing.

* * * * *

The Assistant Solicitor went on and stated that if the case was decided upon the basis of the claimant's evidence, it would have to be concluded that she failed to demonstrate that the contested land was known to be mineral in character on December 21, 1945, and that there is no validity to her claim to the land. He concluded, however, that while the claimant introduced no evidence bearing upon what he deemed to be the critical issue of the case, neither the case presented by the Forest Service nor the charges of the complaint were calculated to elicit such evidence. He noted that the complaint charged simply that the contested land "is nonmineral in character" without any reference to a point in time as of which the mineral or nonmineral character of the land was to be determined.

The Assistant Solicitor recognized that the Forest Service could properly elect to challenge the validity of the claim as of the time of the hearing rather than the time of the withdrawal. He was unwilling to assume, however, that the Forest Service had made such an election. He stated that there was reason to doubt whether the actions of the Forest Service reflected accurately the facts which the Forest Service proposed to establish and concluded that the record was not a satisfactory basis for determining the validity of the claim. He returned the case to the Bureau of Land Management to notify the Forest Service that it had 60 days to recommend the amendment of the complaint or the filing of a new complaint.

On July 23, 1969, an amended complaint was issued charging that a discovery of a valuable mineral deposit had not been made within the claim by December 21, 1945, and the land within the claim (with the exception of the east half of Lot 6) "is nonmineral in character."

The mining claimant sought a dismissal of the complaint contending that it was not filed within the required 60-day period. By a decision dated May 25,

1970, the Bureau's Office of Appeals and Hearings rejected the claimant's contentions and remanded the case for hearing on the amended complaint. This decision was appealed to the Board of Land Appeals. On May 27, 1975, the parties filed a stipulation with the Board requesting an order (1) permitting Clare Williamson to withdraw her appeal from the Bureau's decision issued five years previously, (2) reinstating the order of the May 25, 1970 decision remanding the case for further hearing, and (3) consolidating the case with Oregon 6115. By an order of January 22, 1976, the Board granted the requests in the stipulation.

Oregon 6115 was initiated on April 13, 1970, with the filing of a complaint charging that Claims 1, 3 and 4 were invalid because they had not been perfected by a discovery of a valuable mineral deposit prior to December 21, 1945, and the land within the claims "is nonmineral in character." This case was held in abeyance pending the outcome of the appeal from the May 25, 1970 decision of the Bureau.

(Dec. 2-6).

At the 1976 hearing, the Forest Service presented one witness, Milvoy Suchy, a Forest Service mining engineer, who had also testified at the 1964 hearing. He repeated some of his earlier testimony in condensed form as to Claim No. 2, 2/ and extended his estimates and conclusions concerning the overabundant amount of lump pumice to include Claim No. 1 and the north half of Claim No. 3. He further testified that he had not been able to find sufficient exposures of lump pumice to make any estimate or reach any conclusion concerning the existence

2/ The parties agreed that relevant portions of the 1964 hearing transcript would be incorporated into the record of the case. They also agreed that material presented with respect to Claim No. 2 at the earlier hearing which was pertinent to the other claims could be considered in connection with all four claims. Citations to the 1964 transcript in this opinion will read 1 Tr. , and to the 1976 transcript, 2 Tr.

of lump pumice on the south half of Claim No. 3 and all of Claim No. 4. As at the 1964 hearing, Suchy's testimony was based upon his experience as a mining engineer, his personal observation of the conditions on the four claims, and information obtained at the time of his examination of the claims on nine or ten occasions from 1961 to 1973.

The appellants presented three witnesses who also had testified in 1964: Clare Williamson, the mining claimant; Donald T. Fahey, a general building contractor who had worked for the Williamsons; and James Miller, a market analyst and, by 1976, one of the owners of LaPine Pumice Company. Through these three witnesses, appellants reconstructed the history of activities on the four claims and presented the findings and plans of Lloyd Williamson with respect to the claims. In addition, appellants elicited discussion of the nature and quality of the pumice on the Williamson claims and the use and general marketability of that pumice.

For the purpose of this appeal, it is necessary to examine the specific charges made by the Forest Service. In the amended complaint for Oregon 011735, the Forest Service charged that:

A. A discovery of a valuable mineral deposit had not been made within the unnamed placer claim by December 21, 1945.

B. The portion of the claim made up of lots 3, 4, 5, 7, and the west half of lot 6 is nonmineral in character.

C. As to the following portion of the east half of lot 6:

Commencing at the quarter corner between Section 36, Township 21 South, Range 12 East, and Section 31, township 21 South, Range 13 East, W.M., thence North 34 degrees 15' East a distance of 3744 feet to stake No. 1, the point of beginning; thence South 64 degrees East a distance of 125 feet to Stake No. 2; thence North 26 degrees East a distance of 125 feet to stake No. 3; thence North 64 degrees West a distance of 125 feet to stake No. 4; thence South 26 degrees West a distance of 125 feet to stake No. 1, the point of beginning.

At the time the mining claim was located, the above-described portion of the east half of Lot 6 was not open for the location of a mining claim since it had been appropriated to another use by the issuance of a special-use permit to the Oregon State Game Commission dated December 6, 1932, which permit is still in effect.

In Oregon 6115, the complaint charged that:

A. Minerals had not been found within the limits of the claims in sufficient quantities to constitute a valid discovery prior to December 21, 1945.

B. No discovery of a valuable mineral had been made within the limits of the claims by December 21, 1945, because it had not been shown by that time that the materials could be marketed at a profit or that there existed a market for these materials.

C. The land within the claims is nonmineral in character.

The complaints raise two principal issues: whether there was a discovery on each claim by December 21, 1945, and whether certain portions of Claim No. 2 and Claim Nos. 1, 3, and 4 are nonmineral in

character. We shall address these issues in the order suggested by the complaints since a claim of mineral character may be supported by geological inferences arising out of discovery. United States v. Bunkowski, 5 IBLA 102, 79 I.D. 43 (1972) appeal pending Bunkowski v. Applegate, Civ. No. R-76-182-BRT, (D. Nev. filed Sept. 22, 1976).

[1] Before examining these issues, however, we wish to address a question which neither side has pursued in this appeal. Charge C of the complaint filed in Oregon 011735 alleged that a portion of the east half of Lot 6 was not open to location at the time Claim No. 2 was initiated, because of a prior grant of a special use permit by the Forest Service to the Oregon State Game Commission. This charge is invalid, and should have been dismissed.

Effectively, this charge is premised upon a belief that the Forest Service could, through of a special use permit, withdraw the land. There is no support for such a proposition.

The Secretary of Agriculture, as a general matter, is neither expressly nor impliedly authorized to withdraw unimproved national forest lands from mineral location. See generally United States v. Foresyth, 15 IBLA 43, 49-54 (1974); United States v. Bergdal, 74 I.D. 245, 249-52 (1967); United States v. Crocker, 60 I.D. 285 (1949). Indeed, Exec. Order No. 10355 expressly delegated both the inherent authority of the President to withdraw land, and the authority conferred upon him by the Pickett Act, 36 Stat. 847, 43 U.S.C. § 141

(1970), to the Secretary of the Interior. Included with this was the authority to withdraw land under the administrative jurisdiction of any executive department, with the concurrence of the head of that agency. See Section 1(c), Exec. Order No. 10355, 17 FR 4831 (May 26, 1952).

Without the formal action of the Secretary of the Interior, however, no agency could withdraw the land which it administered. Thus, mere issuance of a special use permit could not operate to withdraw the land from mining or mineral location. A. W. Schunk, 16 IBLA 191, 81 I.D. 401 (1974). See also United States v. McClarty, 17 IBLA 20, 81 I.D. 472 (1974). ^{3/}

At the hearing the parties stipulated to the correctness of this charge (2 Tr. 4). But on review of an appeal this Board has full powers of de novo review. Exxon Co., U.S.A., 15 IBLA 345 (1974). Moreover, as this Board has recognized, parties may not stipulate to an erroneous theory of law. United States v. Ideal

^{3/} The opinion of Judge Fishman correctly notes that where Congress has expressly so provided, the Department of Agriculture can withdraw land from mineral entry. Schaub v. United States, 207 F.2d 325 (9th Cir. 1953); see also Rawson v. United States, 225 F.2d 855 (9th Cir. 1955). It seems axiomatic that Congress can vest the authority to dispose or limit public access to Federal land in any manner which it deems fit. The discussion in the text, however, is directed to the question whether absent specific statutory authority, the Department of Agriculture is authorized to withdraw from mineral location. The answer is clearly in the negative.

The fact that the Forest Service Manual purports to confirm such authority upon the Forest service is of no consequence. Administrative manuals adopted by agencies of the Federal Government do not have the force and effect of law. See Morton v. Ruiz, 415 U.S. 199, 235 (1974). Moreover, it is mere bootstrapping to contend that an agency may delegate to itself powers which it would not have in the absence of the delegation.

Cement Co., 5 IBLA 235, 79 I.D. 117 (1972), aff'd sub nom. Ideal Basic Industries v. Morton, 542 F.2d 1364 (9th Cir. 1976). Accordingly, we hereby dismiss Charge C of the complaint and vacate the stipulation erroneously entered into by the parties. ^{4/}

[2, 3, 4] It is well established that a mining claimant must discover a valuable mineral deposit before he may receive title to a mining claim located on public land. A discovery of valuable minerals under Federal mining laws exists only where the minerals found are 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. United States v. Coleman, 390 U.S. 599 (1968); Chrisman v. Miller, 197 U.S. 313 (1905); Castle v. Womble, 19 L.D. 455, 457 (1894). This "prudent man test" has been refined to require a showing of marketability; that is, a showing that the mineral in question can be presently extracted, removed, and marketed at a profit. United States v. Coleman, supra. In circumstances, such as the present case, where the land is closed to location under the mining laws subsequent to the location of the mining claim, the claim must be supported by discovery at the time of the withdrawal. Cameron v. United States,

^{4/} The discussion in the text is directed solely to the question whether the issuance of the special use permit had the effect of withdrawing the land from mineral location. We do not here decide to what extent, if any, a patent issued for the land would be subject to the permitted use.

252 U.S. 450 (1920); Clear Gravel Enterprises v. Keil, 505 F.2d 180 (9th Cir. 1974); United States v. Henry, 10 IBLA 195 (1973); United States v. Gunsight Mining Co., 5 IBLA 62 (1972); United States v. Isbell Construction Co., 4 IBLA 205, 78 I.D. 385 (1971). Furthermore, if a mining claimant locates a group of claims, he must establish discovery for each claim that he seeks to validate. United States v. Melluzzo (Supp. on Judicial Remand), 32 IBLA 46 (1977); United States v. Bunkowski, *supra* at 120-21, 79 I.D. at 51-52.

[5] When the Government contests the validity of a mining claim, the ultimate burden of proof as to the validity of the claim is upon the mining claimant. The Government, however, bears the initial burden of going forward with sufficient evidence to establish a prima facie case that no valuable mineral discovery has been made. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Bechthold, 25 IBLA 77 (1976); United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975). The Board has stated that prima facie means that the case is adequate to support the Government's contest of the claim and that no further proof is needed to nullify the claim. The Government does not have to negate the evidence presented by the mining claimant. United States v. Bunkowski, *supra* at 119, 79 I.D. at 51. If the Government shows that one essential criterion of the test was not met, it has established a prima facie case. United States v. Taylor, *supra* at 28, 82 I.D. at 75.

Once the Government has established a prima facie case that the claim is not supported by discovery, the burden of going forward then shifts to the contestee to overcome the Government's showing. Humboldt Placer Mining Co. v. Secretary of the Interior, 549 F.2d 622 (9th Cir.), cert. denied, 434 U.S. 836 (1977); United States v. Springer, 491 F.2d 239 (9th Cir.), cert. denied, 419 U.S. 834 (1974); Foster v. Seaton, supra; United States v. Harris, 38 IBLA 137 (1978); United States v. Bechthold, supra.

[6] In determining the validity of a mining claim in a Government contest, the entire evidentiary record must be considered. If the Government fails to make a sufficient prima facie case against a mining claim, the claimant may move to have the contest dismissed and rest his case. However, when that claimant goes forward with his evidence, the Administrative Law Judge must consider the evidence presented and weigh it in accordance with its probative value. In choosing to rebut the case, the claimant still bears the burden of doing so by a preponderance of the evidence and bears the risk of nonpersuasion if he fails. Foster v. Seaton, supra; United States v. Bechthold, supra; United States v. Taylor, supra.

In spite of the Assistant Solicitor's clear directive in his 1968 opinion to address the mineral character of Claim No. 2 as of December 21, 1945, and the Forest Service's complaints charging lack of discovery on all claims as of that date, the Forest Service did

not present at the 1976 hearing any new evidence of conditions on the claims as of December 21, 1945, which constitutes a prima facie case against each claim. Rather, Milvoy Suchy testified as to the conditions of the claims when he surveyed them. He was not asked to give an opinion as to whether the mineral values on the claims were such as would prompt a prudent man to believe in 1945 that the minerals could be extracted and marketed at a profit. See United States v. Knecht, 39 IBLA 8 (1979); United States v. Bechthold, *supra*; United States v. Blomquist, 7 IBLA 351 (1972).

Judge Mesch cited the ruling in United States v. Zweifel, 508 F.2d 1150 (10th Cir. 1975); "If mining claimants have held claims for several years and have attempted little or no development or operations, a presumption is raised that the claimants have failed to discover valuable mineral deposits or that the market value of discovered minerals was not sufficient to justify the costs of extraction." 508 F.2d at 1156, n.5. He asserted that "a prima facie case was made by the evidence showing the production and sale of only 25 or 30 tons of pumice between 1940 and 1945."

We find this to be a weak prima facie case. This evidence appeared initially as Contestant's Exhibit No. 2 at the 1964 hearing and no opinion was sought by the Government from witness Suchy as to the effect of those facts on the issue of discovery. While Judge Mesch could properly apply the law to these facts, we note that on the face of the documentary

evidence, the notation "1942-1945 (Did not operate, Mr. Williamson in war job)" explains the temporary lapse in sales and rebuts the presumption stated in the Zweifel Rule.

Judge Mesch stated that the test to be applied in this case, as defined by the Assistant Solicitor in his 1968 decision, is "whether, on the critical date * * *, known conditions were such as reasonably to engender the belief that the land contained mineral of such quality and quantity as to render its extraction profitable and justify expenditures to that end." He noted that neither party at the 1976 hearing attempted to supply evidence as to whether an estimate of the quantity of useable pumice on the claims could have been made upon the basis of evidence discernible in 1945. He found that the positions taken by the Forest Service at the 1976 hearing 5/

constitute a recognition or admission that there is no question of quantity or quality and that the only matter for decision is whether, as of the critical date, the lump pumice found on the claims could have been extracted and marketed at a sufficient profit to justify a person of

5/ The positions of the Forest Service as summarized by Judge Mesch are:

"(1) all of the claims are invalid because they had not been perfected by the discovery of a valuable mineral deposit as of December 21, 1945, and (2) if there was a discovery, it would only validate the east half of Lot 6 of Claim No. 2 because (a) the remaining portions of that claim, all of Claim No. 1, and the north half of Claim No. 3 would be invalid under the theory of excess reserves as of December 21, 1945, and (b) the south half of Claim No. 3 and all of Claim No. 4 would be invalid because the lands were nonmineral in character from the standpoint of the quantity or nonexistence of lump pumice as of December 21, 1945." (Dec. 6-7). He also notes that contestees were in apparent agreement with these issues.

ordinary prudence in spending his time and money mining the pumice. In other words, could sufficient pumice have been marketed at a sufficient profit to justify its exploitation. Under the positions taken by the Forest Service, quantity becomes an issue only if a finding is made that there was a timely discovery.

(Dec. 8-9).

Judge Mesch began his analysis of the evidence as to marketability by examining the production and sales tabulations for the claims during the period 1940-1963. The parties stipulated to these figures at both hearings. He noted that the Forest Service agreed that the production reflected in the tabulations was extracted at a profit but indicated that the record did not show the amount of profit and it was impossible to ascertain the amount from the evidence. Accepting the sales figures as total net profit, he then averaged the values during three periods of time and derived average yearly sales figures of \$175 per year from 1940-1945, \$1,866.66 per year from 1946-1948, and \$1,368.45 per year from 1949-1961. On the basis of these computations he held that it would be "hard to believe that a person of ordinary prudence would have been willing as of December 21, 1945, to invest his time and money to develop the pumice on Claim No. 2 (from which 95 percent of the production came) or to develop any of the other three claims" (Dec. 9-10).

Judge Mesch concluded his analysis of the marketability of the lump pumice in these claims as follows:

I recognize that evidence of sales or the successful exploitation of a mining claim is not necessary to satisfy the prudent man test. However, with the exception of the evidence showing the production of 25 or 30 tons of pumice in 1940-1941, the general admission by the Forest Service that it was produced at an unknown profit, the implied recognition by the forest Service that the pumice was of a quality that would have met the market demand, and the fact that there was some market in the United States of an undisclosed extent for pumice, there is nothing in the record showing the conditions that existed as of December 21, 1945, which would have engendered the belief that a sufficient amount of pumice could have been sold at a sufficient profit to attract the efforts of a person of ordinary prudence in extracting and marketing the pumice from the claims.

Without some evidence as of December 21, 1945, relating to (1) the costs of extracting the pumice from the claims, (2) the costs of sorting, bagging, or other processing of the pumice, (3) the costs of transportation, (4) the costs of marketing, (5) the sale prices of pumice for various uses, and (6) the amount of pumice from the claims that might reasonably be expected to enter the market, no one could conclude that a prudent person would have been justified in spending his time and money extracting the pumice from any of the contested claims as of December 21, 1945.

(Dec. 11-12).

Judge Mesch is correct that there is no evidence in the record providing actual production costs and market prices for lump pumice as of December 21, 1945. Appellants assert that Judge Mesch erred in nullifying the claims on this basis. In the context of this case, we agree. ^{6/}

^{6/} We also wish to note that the Board does not necessarily concur with Judge Mesch's view that a profit of either \$1,866 per year or \$1,368 per year would not justify a person of ordinary prudence in the expenditure of funds. First, it must be remembered that the

[7] As already stated, the test for discovery is whether conditions are such that a prudent person would be willing to invest time and money in developing a mining claim. Where a withdrawal of the land from mineral location is involved, a claimant must show that such conditions were extant at the time of the withdrawal. In this case, the marketability test requires evidence that the claimed mineral was marketable as of 1945. Location based on speculation that there may be a market in the future for the mineral does not establish discovery. Barrows v. Hickel, 447 F.2d 80, 83 (9th Cir. 1971).

While reference to sales and receipts for a period of years is certainly relevant to the determination of the existence of a discovery, it cannot be solely determinative of a claim's validity, particularly where, as here, the question concerns the size of a profit and not whether any profitable mining could occur at all.

It is well established that, although a favorable showing of actual sales may demonstrate marketability, lack of such sales is not conclusive on the issue of marketability. Lack of sales may be overcome, after all the evidence is adduced, by a preponderance of

fn. 6 (continued)

claims were subject to mining, due to their topographic situation, for only a small part of the year. (See, e.g., 1 Tr. 213, 259-60, 262). Moreover, a profit of \$1,866 in 1946-48 would represent a considerably greater amount of money than it would today. In light of our disposition of this appeal, however, it is unnecessary to determine if such profit, in and of itself, was sufficient to establish the validity of Claim No. 2.

the evidence showing that a prudent individual had a reasonable expectation of his or her ability to extract and market the mineral profitably. See Verrue v. United States, 457 F.2d 1202 (9th Cir. 1972; Barrows v. Hickel, *supra* at 82; United States v. Gibbs, 13 IBLA 382, 391 (1973); United States v. Harenberg, 9 IBLA 77 (1973).

Inasmuch as evidence indicating a total lack of sales and production may be overcome by relevant evidence, a fortiori, the existence of sales which may be deemed to be insufficient cannot be deemed to conclusively establish the invalidity of a claim.

There may be a number of reasons why any individual claimant might decide to limit production from a claim. Herein, appellants testified that production had purposefully been held to minimum levels in order to avoid heavy investment in an unpatented mining claim (2 Tr. 70-71). This is, of course, a common problem with mining claims, since both individuals and lending institutions are often reluctant to invest great funds in a mining venture in the absence of a patented mining claim. Moreover, the testimony elicited at the hearings gives independent support to appellants' allegations.

The Forest Service stipulated to the profitable sale of lump pumice extracted from Claim No. 2 in 1941. Therefore, it was unnecessary for appellants to produce evidence of profitability by actual

cost and market price statistics for that sale. It is clear from the record that after this initial marketing of material from the claim, production was temporarily stopped from 1942-1945 because of World War II. ^{7/} The court in Charlestone Stone Products Co., Inc. v. Andrus, 553 F.2d 1209 (9th Cir. 1977), rev'd in part on other grounds 436 U.S. 604 (1978), described a similar situation as follows:

The seemingly sporadic operations by Southern and Brawner were a mirror of the building and construction industry in the Las Vegas area during and shortly after World War II. Continuous operation of a placer mining claim is not a per se requisite to proving the validity of that claim. Cessation of operation of any economic enterprise may be caused by innumerable factors totally beyond the bona fide intentions of the operator. Reasons dictates that periodic cessation of operation of a placer mining claim, short of an intentional abandonment of the claim, need not defeat ultimate proof of validity.

Since a total absence of operation does not preclude a finding of validity (Verrue, supra), it follows that sporadic operation does not preclude a finding for validity.

553 F.2d at 1214-15.

^{7/} At both hearings, evidence was produced concerning Lloyd Williamson's activities during World War II. In their statement of reasons appealing Judge Mesch's decision, appellants argue additional facts related to the impact of World War II on their mining activities. The Board has not considered this latter information as part of the record of this case. It is well established that the Board will consider evidence tendered for the first time on appeal only for the limited purpose of determining whether a further hearing is needed. Furthermore, the Board will receive such evidence for that limited purpose only when there is a clear and convincing reason why the evidence was not submitted at the original hearing. United States v. Maley, 29 IBLA 201 (1977); United States v. MacIver, 20 IBLA 352 (1975); United States v. McKenzie, 20 IBLA 38 (1975).

In the present case, there was no abandonment. In fact, Lloyd Williamson and his associates relocated Claim Nos. 1 and 2 during the period of no production to eliminate original locators who were not doing any work on the claims (2 Tr. 67). Previously, they had defended Claim No. 2 against other locators (2 Tr. 74-77; Contestees' Exhibit I, 1976 hearing). We know from Clare Williamson's testimony as well as Forest Service evidence that Lloyd Williamson worked in a "war job" from 1942-1945 and as a direct result the claims could not be mined (2 Tr. 164; Contestant's Exhibit No. 2, 1964 hearing). It is also clear from the record that Lloyd Williamson had well-thought-out development plans for the claims which were interrupted by World War II (2 Tr. 65-66, 157-59).

Clare Williamson was questioned about their lump pumice business during the 1942-1945 period of nonproduction.

Q Now, during the years 1944 and in 1945, as well, we were embroiled in the Second World War. I would assume that there was very little mining operation going on up in that area during that period, is that correct?

A [Clare Williamson] Oh, yes, of course.

Q So, would it be fair to say that you were more or less examining or investigating your possible markets during that year?

A Well, that's true, yes; yes, that's true.

(2 Tr. 157). Since the Williamsons could not actually mine and market the lump pumice on their claims, they clearly did the next best thing,

maintain contact with and further develop their market. Williamson testified that she and her husband made numerous inquiries to prospective customers of lump pumice. They received positive responses and requests for samples which they provided. They received unsolicited inquiries as well (2 Tr. 155-57). We conclude that these activities evidence the reasonable response of a prudent person who has a marketable claim but is faced with circumstances beyond his control.

There is additional evidence that suggests that the Williamson lump pumice could have been successfully mined. At the 1964 hearing, appellants introduced a letter dated August 14, 1963, and addressed to Clare Williamson from the president of Charles L'Hommedieu and Sons Co. in Chicago, Illinois, one of her customers (Exhibit O). The letter reads:

Lump Pumice Stone was being used to clean and dress polishing and grinding wheels and buffs when I entered this business in 1925. In fact, our records show it was in common use for this purpose when Chas. F. L'Hommedieu & Sons Co. started business in 1898.

In recent years it is also being used to clean grease and residue from abrasive belts and it is our opinion that the demand for this material will continue for many years to come.

At one time Italian Lump Pumice Stone was also used, but this material was harder and heavier than the domestic grade and did not do the cleaning job nearly as well as the Lump Pumice Stone you have been supplying us for many years.

We have had numerous requests from the United States Government for lump pumice stone cut in blocks 4" X 4" X 8" long, which is used for cleaning kitchen grills.

Should you ever be in a position to furnish it in this shape, we are certain you would substantially increase your market.

The letter establishes that a general market for lump pumice existed as early as 1898. Contestant's Exhibit 16 (1964 hearing), an article on pumice from the Bureau of Mines Minerals Facts and Problems states that "[p]robably the earliest record of domestic pumice production for abrasive purposes was in 1883."

At least two major reports had been prepared prior to 1945 describing the geological character of the Newberry Crater area of eastern Oregon which includes the Williamson claims. The earliest published report in 1935 was prepared by Howell Williams and entitled "Newberry Volcano of Central Oregon." The second, entitled "Nonmetallic Mineral Resources of Eastern Oregon," was written by Bernard N. Moore and published in 1937. Both reports were introduced by appellants at the 1976 hearing (Exhibit G) and the Williams report was placed in evidence by the Forest Service at the 1964 hearing (Exhibit 1). The significance of the reports is pinpointed by the testimony of Mr. Miller:

Q I understand. Do you have tabbed the edges of the divider -- "Williams, 1935; Moore, 1937; Higgins, 1967; Higgins, 1969; Photos and Maps; History of Claims; and Claim Contest 40 and 41". To what does "Williams, 1935" refer?

A [Mr. Miller] "Williams" refers to the Newberry Volcano of Central Oregon, and he's considered one of the basic underlying reports on that area.

Q The Moore report is referred to up here. Williams first -- now we referred to the "Moore, 1937". Is this a publication by Mr. Moore covering this particular area and the pumice development in that area?

A This area was included as a major portion of this -- of the pumice section of this report, yes.

Q Do these reports touch upon the economic feasibility of mining pumice as well as the geological existence of the deposits?

A This is the reason for the inclusion of this report. It's the one that went into this -- delved into this more than any of the rest of them. The others really just touched upon it. They were more or less in the geology. This report goes into the economics of it.

* * * * *

Q * * * [Were the reports] included in your prepared exhibit to show the conclusions of these writers as to the formation of these pumice deposits, as well as their commercial value and the extent of their existence?

A I put them in primarily to show that the claims were staked in conformity with existing known pumice occurrences. Point 1 -- they show also that there was every reason to believe there were different types of pumices up there, and it wouldn't be all one mass deposit of similar type pumice; and it was a commercial type.

Q You have included here Howell Williams' map, which is a reprint, I take it?

A I blew this up because I think when you read the normal Howell Williams report, it escapes the average reader that these pumice cones -- the one that we have on Claim 4 in the central pumice cone, and the one that was not staked -- the one that's in the north -- and no longer stakeable -- are complete rhyolite pumice cones in their entirety and what you would expect to find in one portion of you would expect to find in the others, and the better section of that is this cross-section which is shown here, and I've colored, again with their code, which shows the central pumice cone as being the main one, and it shows that the obsidian flow that came out one side of it -- it shows where it is and if you look at the staking pattern on this thing, you'll see that these gentlemen must have staked these claims in line with Moore's report and made

no attempt to stake areas that didn't involve pumice. They left out the obsidian flow and anything in relation thereto.

(2 Tr. 136-39).

These reports establish that prior to 1945 the existence of significant pumice deposits in the area of the Williamson claims was known. The testimony of Miller with respect to the staking of the Williamson claims and that of both Williamson and Fahey with respect to Lloyd Williamson's familiarity with the reports (2 Tr. 67, 155) indicates that anyone desiring to mine and market lump pumice did have access to information describing the mining and marketing of lump pumice in Oregon prior to 1945. The Moore report which particularly focuses on the quality, use, and market for lump pumice found in eastern Oregon includes a section entitled "Economic Aspects of the Pumice," containing the following statement: "Lump pumice of possible commercial interest covers an area of about 3,500 square miles east of the summit of the Cascade Range. There are three different types, which are represented by the older and younger sheets of Crater Lake and the pumice of Newberry Crater" (p. 171, emphasis added). Moore concludes his report with a section on "Development" in which he describes some successful efforts at marketing lump pumice, including one "at considerable profit." He further notes that "[t]he pumice deposits of eastern Oregon are practically undeveloped,

probably because of very recent availability of suitable railroad transportation" (pp. 174-75). The inference drawn is that the pumice was suitable for development.

We conclude that the Moore report would have certainly prompted an interested person to explore the Newberry Crater Region and, having located an appropriate claim, investigated the market, and profitably sold from the claim, to reasonably believe that he could profitably develop a lump pumice business. The testimony of Suchy and Miller as well as the Williams and Moore reports show that the lump pumice in the claims is good quality pumice and that the claims contain more than one type of lump pumice, making them adaptable to a variety of commercial uses. The profitable marketing of material from Claim No. 2 in 1941 represents a bona fide beginning to developing a workable mine and inquiry in the following years disclosed further evidence of a continuing market.

Nonmineral in Character

At the beginning of the 1976 hearing, Judge Mesch and Mr. Reifenberg, counsel for the Forest Service, agreed, without comment from Mr. Morrell, counsel for appellants, that there are really two issues encompassed by the Forest Service charge that portions of Claim No. 2 and all of Claim Nos. 1, 3, and 4 are nonmineral in character (2 Tr. 5-6). They assert that the lands embraced by the S 1/2

of Claim No. 3 and all of Claim No. 4 are nonmineral in the sense that they are mineral in character because of an insufficient quantity of lump pumice to justify consideration as a valuable mineral deposit and also that, assuming the validity of some of the claims, certain lands are nonmineral because of excess reserves which make the lump pumice unmarketable.

[8] Mineral in character and excess reserves can be seen as differing facets of a single concept. Land is mineral in character when known conditions engender the belief that the land contains mineral of such quantity and quality as to render its extraction profitable and justify expenditures to that end. United States v. Meyers, 17 IBLA 313 (1974); United States v. McCall, 7 IBLA 21, 79 I.D. 457 (1972). The charge that the lands embraced by a mining claim are not mineral in character can raise two discrete issues. First, it can challenge the validity of the entire claim. As such, it is the normal adjunct to a charge of no discovery. Alternatively, it can be applied to placer claims which are supported by a discovery, with the effect that the claimant must show that each 10 acres of the claim are mineral in character. Id. Thus, to the extent that a placer claim embraces 10-acre subdivisions which do not have the located mineral present, those portions which are nonmineral will be declared null and void.

[9] Questions relating to excess reserves, though they are interrelated to a determination of the mineral character of land,

arise in a different context. The charge of invalidity due to the presence of excess reserves admits that the mineral, qua mineral, exists within additional claims, but raises the contention that because of the quantity of mineral in other claims owned by a mining claimant, the mineral in certain claims would have no market and thus is essentially valueless.

The value of all minerals, with the possible exception of intrinsically valuable minerals such as gold and silver, is directly related to the market for the minerals. Thus, if we assume that the market for a mineral is 1,000 tons a year, an individual with a supply of 10,000 tons would be capable of fulfilling market requirements for the next 10 years. In the first year, the value of an initial 1,000 tons is the market value. The value of the subsequent tonnage, however, is discounted owing to the inability to market it immediately. This is not to say that the remaining 9,000 tons is valueless. Rather, each ton's relative present value declines depending upon how long it is necessary to wait until it can be marketed. If, however, we assume that the mining entity has a total supply of 1,000,000 tons of mineral, but that the market will still only absorb 1,000 tons a year, it will be seen that a vast amount of the tonnage effectively has no present value. If we assume a static market demand, it will take 1,000 years to market the entire mineral supply. The present value of earnings a millennium in the future can safely be viewed as zero.

This is the problem with which the concept of excess reserves deals. If an individual has an admittedly valid mining claim which itself contains reserves sufficient to meet the reasonable market demand, giving due consideration to foreseeable expansion and contraction thereof, for a period in excess of 50 years, additional deposits of the same mineral, located by the same individual, effectively have little or no present value. Since present value is the benchmark of the marketability test, such additional claims are not valid. United States v. Baker, 23 IBLA 319 (1976); United States v. Bunkowski, *supra*; United States v. Anderson, 74 I.D. 292 (1967).

Review of the 1976 hearing transcript suggests that the Forest Service did concede that the mineral existed on Claims Nos. 1, 2, and 3. With respect to Claim No. 2 it is clear that it did not wish to challenge existence of the mineral but rather was claiming that there were excess reserves within the claim's boundary. Prior to presenting the contestees' witness, Mr. Morrell moved to strike the charge as to nonmineral character of portions of Claim No. 2:

MR. MORRELL: All right. Now, likewise, with regard to 011735, Paragraph V, Subdivision (b), the Contestees do move the Court to strike from the complaint, that charge that a portion of the claim made up of Lots 3, 4, 5, 7 and the west half of Lot 6 is non-mineral in character, be stricken. Now, that is referring -- those lots are lot numbers referring only to Claim No. 2 and we feel that there has been no evidence at all introduced here to support that charge.

JUDGE MESCH: Mr. Reifenberg?

MR. REIFENBERG: If it is still understood that our reserve question remains in the case, then I would have no objection to the move.

JUDGE MESCH: Let me say this, Mr. Morrell: I have to write a written decision in the case, after I have studied all of the evidence. I had intended simply to pretty much ignore the issues -- the charges as stated in the two complaints, and simply point out in my decision what the issues were to be decided in this case. One of them would be the -- whether the south half of Claim No. 3 and all of Claim No. 4 is non-mineral in character from the standpoint of the absence of any showing of quantity within the lands. Now, that is stated very roughly, but I would pose that as an issue. So with that, if you want to proceed further with the charges in the complaint, it's all right. I just wanted to mention what my thinking was.

MR. MORRELL: Well, we felt that the charge in the complaint that it is non-mineral in character not only was not proved, but that the contrary was proved by the witness, Suchy, that Lots 3, 4, 5, 7, and the west half of Lot 6 were all mineral in character, generally; and I don't know what that means, but I -- everybody seems to have a different idea of what that means, but it is something that my -- I believe they had the burden of proving that and I don't think they have made the grade, and for that reason, I do not want to overlook making my record.

JUDGE MESCH: Very well. Disregarding the question of excess reserves, I would agree with you.

MR. MORRELL: All right.

JUDGE MESCH: At least today. I don't know what there is in the previous hearing, but at least today, there has been no evidence presented that the lands described in Charge V(b) are non-mineral in character. But at the beginning of the proceeding, Mr. Reifenberg, in effect, indicated he wasn't making that allegation, other than from the standpoint of excess reserves.

(2 Tr. 41-43).

[10] A charge that lands are nonmineral in character does not necessarily give rise to a claim that there are excess reserves, since it is normally premised on a total lack of mineralization, as indeed, the Government contends exists on the S 1/2 of Claim 3 and all of Claim 4. In a mining contest a matter not charged in the complaint cannot be used as a ground to invalidate a claim, unless it has been raised at the hearing and the contestee has not objected. United States v. McElwaine, 26 IBLA 20 (1976); United States v. Northwest Mine and Milling, Inc., 11 IBLA 271 (1973); United States v. Pierce, 3 IBLA 29 (1971). The excess reserve issue in this case was raised in the Forest Service statement of issues submitted to Judge Mesch prior to the hearing. Appellants received a copy of the statement and therefore they had notice of the issue. Since they made no objection at the hearing, we conclude that they have not been prejudiced by the failure to specifically charge in the complaint that there were excess reserves within the claims. United States v. Northwest Mine and Milling, Inc., *supra*.

While it is clear from the record that there was lump pumice on Claim No. 2 sufficient to warrant a prudent man to expect that he could profitably extract the mineral, the record is not clear as to what is the full extent of the quantity of the pumice on the claim. Suchy estimated that there was a half million tons on Claim No. 2 (compare 1 Tr. 42 with 2 Tr. 18). That estimate and his methods of reaching it were disputed by claimant's experts. (See, e.g., 1 Tr. 149). No other estimates for the entire claim were proffered, however.

Judge Mesch noted that the evidentiary record indicated that only a total of 650 tons of pumice had been marketed over a period of 24 years. Were we to base our estimates of the reasonably foreseeable market solely on the basis of past production, it would be clear that the amount of pumice solely on Claim No. 2 would be greatly in excess of that which might reasonably be deemed to have any present value. There are other factors, however, which we feel are properly considered in making this determination.

First, we have noted that the testimony of Suchy was criticized by certain of appellants' witnesses. As an example, in the 1964 hearing Suchy had testified that 50 to 60 thousand tons of marketable pumice existed on the east half of Lot 6, consisting of 17 acres (1 Tr. 42). The east half of Lot 6 had not been contested by the Forest Service at the time of the 1964 hearing. Leslie C. Richards, who the Government had stipulated was an expert witness (1 Tr. 16), estimated that the total amount of merchantable pumice in the east half of Lot 6 was 8,500 tons (1 Tr. 153-55). Thus, the Government's estimate was over 500 percent greater than that of appellants' expert.

Second, we have already made reference to appellants' assertion that they purposefully held down production. In the 1976 hearing, appellants submitted a copy of a letter from the Buying Department of the Procter & Gamble Company, requesting a copy of their price indications based on an estimated rate of 2,700 tons a year (2 Tr. 121,

Exhibit E). Given the wide variance in the estimated quantities of the pumice, plus the reasonable anticipation of an increased market for the mineral should the production facilities be upgraded, we are unable to say that excess reserves existed within the physical boundaries of Claim No. 2. 8/

When we examine the other claims, however, it seems apparent that any reasonably foreseeable market increase would be more than adequately supplied by the material found on Claim No. 2. Suchy testified that there were 500,000 tons of usable pumice on Claim No. 1, and 250,000 tons on Claim No. 3 (2 Tr. 18). Suchy provided no estimate as to Claim No. 4, probably owing to the fact that he found no usable pumice within the limits thereof (2 Tr. 13). It is unnecessary for us to decide whether lump pumice does, in point of fact, exist on Claim No. 4, inasmuch as we feel that it is clear that any pumice deposits which are located on other claims would clearly be in excess of any foreseeable market demand.

Assuming that only half of the pumice estimated by Suchy actually existed in claim No. 2, and assuming appellants were able, on a yearly basis to produce 3,000 tons (which we note is more than four times their total production to date), the mineable reserves should last

8/ In light of our disposition, we do not now pass on the question of whether the existence of excess reserves within a single claim in which a discovery exists, can serve as a predicate for a declaration of invalidity as to those positions which are excess.

for over 83 years. Any additional reserves would have so attenuated a value that they could scarcely be said to possess any present value whatsoever. Thus, we have no recourse but to hold that Claims Nos. 1, 3, and 4 are invalid since the minerals embraced within their limits have now, and had in 1945, no present value.

[11] Since the primary purpose of validating a claim is so that the minerals can be extracted and marketed, appellants must also show that marketability has continued since discovery and that the minerals can presently be profitably extracted. United States v. Harenberg, *supra*. The record provides considerable evidence of development of the claims since 1945 to support a conclusion that Claim No. 2 is presently valuable for lump pumice. By stipulation of the parties, lump pumice from the claim has been continuously marketed at a profit since 1946. It sells for a variety of commercial uses. Although appellants have limited production up to this time because they have no patent and because of Forest Service requests to restrict their activities, they have investigated the market and have additional customers whose business may be available to them (2 Tr. 120-22, 125). We find no evidence in the record which would substantiate a finding of a lack of present marketability.

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 as to Claims Nos. 1, 3, and 4 and

reversed as to Claim No. 2 which is hereby held to be valid in its entirety.

James L. Burski
Administrative Judge

I concur:

Newton Frishberg
Chief Administrative Judge

45 IBLA 301

ADMINISTRATIVE JUDGE FISHMAN CONCURRING SPECIALLY:

I concur in the main opinion except as indicated below.

This opinion recites in part that "issuance of a [Forest Service] special use permit could not operate to withdraw the land from mining or mineral location. A. W. Schunk, 16 IBLA 191, 81 I.D. 401 (1974)."

As stated in Schunk, the Forest Service Manual, section 2811.25, recites that lands used or occupied under a special land use permit are ipso factor closed to mineral entry.

Both of these positions, enunciated as universal principles, are not correct. I adhere to the rules enunciated in Schunk that a special use permit, issued by the Forest Service for a privately-owned electric transmission line does not close the land to mineral entry.

We also pointed out in Schunk that the Forest Service Manual relies on United States v. Mobley, 45 F. Supp. 407 (N. D. Calif. 1942), and Schaub v. United States, 207 F.2d 325 (9th Cir. 1953), as supporting its conclusion that the issuance of such a permit closes the land to mineral entry. In Schunk, we stated that Mobley's discussion of the issue was obiter dicta, since the court found that the mining claim was null and void for lack of a discovery of a valuable mineral.

Schunk discussed Schaub at 81 I.D. at 403 as follows:

In Schaub a material site had been designated for use in connection with Federal Aid Highway construction under 23 U.S.C. § 18 (1946), now § 317 (1970). The material pit was also designated for special use under the Act of March 30, 1948, 62 Stat. 100 (formerly 48 U.S.C. § 341 (1954). Under that Act, the Secretary of Agriculture may authorize use of national forest lands in Alaska for various purposes:

* * * and after such permits have been issued and so long as they continue in full force and effect the lands therein described shall not be subject to location, entry, or appropriation, under the public land laws or mining laws, or to disposition under the mineral leasing laws: * * *.

The Court held that the federal use of the lands for material site purposes effectively closed the lands from further appropriation.

In Schaub the mineral claimant sought to acquire mineral materials which were then being mined by or for the United States for federal use.

The Forest Service issues special use permits for virtually every kind of occupancy. 1/

1/ 36 CFR 251.1 provides in part as follows:

"(a) Special uses. (1) All uses of national forest lands, improvements, and resources, including the uses authorized by the act of March 4, 1915 (38 Stat. 1101), as amended July 28, 1956 (Pub. L. 829, 84th Cong.; 70 Stat. 708; 16 U.S.C. 497), the act of March 30, 1948 (62 Stat. 100, 48 U.S.C. 341), and section 7 of the act of April 24, 1950 (64 Stat. 84; 16 U.S.C. 580d), and excepting those provided for in the regulations governing the disposal of timber and the grazing of livestock or otherwise specifically authorized by acts of Congress, shall be designated 'special uses,' and shall be authorized by 'special use permits.'

* * * * *

"(c) Other authorizations. The Chief of the Forest Service is also authorized to issue permits, execute leases, and grant easements as follows:

"(1) Permits under the act of June 8, 1906 (34 Stat. 225; 16 U.S.C. 431, 432), for the examination of

Thus it appears that a special land use permit is effective to bar mining locations where the applicable statute authorizing the issuance of the permit constitutes the issuance thereof as an appropriation of the land. This is not to say that other circumstances attending the issuance of a special land use permit may not bar mining locations. For example, if the Forest Service issued a special land use permit for the construction of a hotel, which was built, we probably would be hard put to deny that the situs of the hotel was closed to mining. See United States v. McClarty, 17 IBLA 20, 50-53, 81 I.D. 472, 485-7 (1974); John W. Pope, 7 IBLA 73 (1974).

Frederick Fishman
Administrative Judge

fn. 1 (continued)

ruins, the excavation of archaeological sites, and the gathering of objects of antiquity in conformity with the uniform rules and regulations prescribed by the Secretaries of the Interior, Agriculture, and War, December 28, 1906 (43 CFR 3.1 to 3.17).

"(2) Leases of land under the act of February 28, 1899 (30 Stat. 908; 16 U.S.C. 495), in such form and containing such terms, stipulations, conditions, and agreements as may be required in the public interest.

"(3) Easements for rights-of-way for poles and lines, including telephone and telegraph lines, for communication purposes, and for radio, television, and other forms of communication transmitting relay, and receiving structures and facilities, under the provisions of the act of March 4, 1911 (36 Stat. 1253, 16 U.S.C. 523), as amended by the act of May 27, 1952, (Pub. L. 367, 82d Cong., 2d Sess., 66 Stat. 95), subject to such payments as maybe equitable and to such stipulations as may be required for the protection and administration of the national forests.

"(4) Permits, leases, and easements as authorized by the act of September 3, 1954 (Pub. L. 771, 83d Cong.), to States, counties, cities, towns, townships, municipal corporations, or other public agencies for periods not in excess of 30 years, at prices representing the fair market value, fixed by the Chief, Forest Service, through appraisal, for the purpose of constructing and maintaining on such lands public buildings or other public works."

