

Editor's note: appealed -- aff'd in part, remanded on one issue, Civ.No. A80-124 (D.Alaska Mar. 26, 1982); On judicial remand hearing ordered by order dated Sept. 26, 1984 -- See 46 IBLA 228A th C below; See 104 IBLA 93; Appealed -- dismissed, Civ.No. A88-448 (D.Alaska April 11, 1990); refiled Civ.No. A90-237 (D.Alaska June 13, 1990), aff'd, July 31, 1993, dismissed (settled), No. 93-35102 (9th Cir. Aug. 25, 1993)

UNITED STATES
v.
JOSEPH R. AND ALETHA HENRI

IBLA 79-471

Decided March 27, 1980

Appeal from decision of Administrative Law Judge E. Kendall Clarke, declaring lode mining claims null and void. Contest No. AA-9594.

Affirmed.

1. Administrative Procedure: Hearings -- Mining Claims: Hearings

The Government has established a prima facie case when a mineral examiner testifies that he has examined a mining claim and has found the mineral values insufficient to support a finding of discovery.

2. Mining Claims: Discovery: Generally

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

3. Administrative Procedure: Burden of Proof -- Mining Claims:
Contests -- Mining Claims: Discovery: Generally

When the Government contests a mining claim on a charge of no discovery, it has by practice assumed the burden of going forward with sufficient evidence to establish a prima facie case; when it has done so, the burden shifts to the claimant to show by a preponderance of the evidence that a discovery has been made and still exists within the limits of the claim.

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

Material which is principally valuable for use as fill, sub-base, ballast, riprap or barrow, for which ordinary earth or rock may be used, is not locatable under the mining laws and was not locatable prior to July 23, 1955.

5. Mining Claims: Discovery: Generally

The sale of decorative building stone from the surface of a lode mining claim cannot support a claimant's contention that a valuable mineral discovery has been made on such lode claim, decorative stone being locatable only under the provisions of the placer mining laws, 30 U.S.C. § 161 (1976), and only where such stone is shown to be an "uncommon variety" within the meaning of 30 U.S.C. § 611 (1976). A lode mining claim will not support a finding that decorating stone has been discovered, since that deposit was locatable only under the placer mining laws.

6. Mining Claims: Common Varieties of Minerals: Generally

In order to establish that a type of stone material is not a common variety under the Act of July 23, 1955, a mining claimant must demonstrate that: (1) the mineral deposit has a unique property, and (2) the unique property gives the deposit a distinct and special value. Where evidence

does not establish that slate in a particular deposit has a unique property which imparts a distinct and special value, distinguishable from other slate the deposit is a common variety of stone within the meaning of the Act of July 23, 1955.

7. Mining Claims: Common Varieties of Minerals: Generally

Without evidence that quartz has a property giving it a special and distinct value, it is a common variety no longer locatable under the mining laws. The test of "uncommonness" is not met by speculation that attractive bits of quartz could be sold to tourists and rockhounds.

8. Mineral Lands: Generally -- Mining Claims: Discovery: Generally -- Mining Claims: Location

The purpose of 30 U.S.C. § 38 (1976) whereby a person or association may establish a right to patent lands which said person or association has held and worked for a period equal to the statute of limitations is to obviate proving formal compliance with requirements for locating a claim, but it does not dispense with proof of discovery.

APPEARANCES: Eugene F. Wiles, Esq., Delaney, Wiles, Moore, Hayes & Reitman, Inc., Anchorage, Alaska, for appellants; James R. Mothershead, Esq., U.S. Department of the Interior, Anchorage, Alaska, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

This appeal is from a decision dated May 14, 1979, by Administrative Law Judge E. Kendall Clarke, declaring certain lode mining claims null and void. 1/

1/ The claims are described as follows:

"Boston King Lode; Dewey Lode; Salmon Creek Falls Lode Claim Number One; Salmon Creek Falls Lode Claim # One; Salmon Creek Lode Claims #1 and #2; and Salmon Creek Falls Lode Claim # One Lode Mining Claims, situated in Sec. 9, T. 41 S., R. 67 E., Copper River Meridian, Juneau Recording Office, First Judicial District, Alaska * * *."

The contest was initiated on August 28, 1975, when the Bureau of Land Management (BLM), filed a complaint charging that there were no minerals within the limits of the claims in sufficient quantities to constitute a valid discovery. The complaint also charged that the claims were null and void because of conflicting Alaska State land selections, intervening powersite reservations, and because appellants failed to perform annual improvements.

A hearing on the contest was held November 16-18, 1976, in Juneau, Alaska.

In his decision the Judge found that there was no discovery of a valuable mineral on any of the claims. He therefore found it unnecessary to consider the remaining charges in the complaint.

[1, 2, 3] Appellants generally assert that the decision is unsupported by and even contrary to the evidence. We do not agree. Having reviewed appellants' assignments of error in light of the record, we find that the Judge's analysis and conclusions are amply supported by evidence and applicable authorities. We agree with the decision and adopt it as the decision of this Board.

[4] Appellants' first specific challenge is directed to the finding that there was no discovery of sand, gravel or building stone. In their statement of reasons, appellants have tabulated numerous items of testimony concerned with estimated quantities of sand and gravel on the claims. These data were considered by the Judge. They do not meet the discovery requirements of applicable authorities. In any event, the use of sand, gravel, and related materials as road base or fill and for comparable purposes negates locatability. United States v. Verdugo & Miller, Inc., 37 IBLA 277 (1978). Such materials were not locatable prior to July 23, 1955, and are not locatable under the present mining law.

[5] As to building stone, appellants recite testimony that decorative stone (sericite slate) 2/ has always been taken from the claims, was used in walls, fireplaces, and patios, and was highly

2/ In the decision the spelling is "cerousite slate." Appellants state that the mineral in question is sericite slate as listed in "A Dictionary of Mining Mineral and Related Terms, 1968." The 1968 edition of that volume, however, lists the term "sericite" and indicates that sericite is used as a prefix to many names of metamorphic rocks containing the mineral. It defines sericite as "white potash mica very similar to, if not identical with, muscovite mica." The definition further states that the material "occurs in small flakes and scales in metamorphic rocks." Cerousite, apparently a phonetic spelling, is not listed in the Dictionary. Cerussite is a lead carbonate, and obviously not the mineral under discussion.

sought after. In this connection appellants contend that the stone is not a placer material but is present in veins throughout the claims.

The short answer to these arguments (as discussed by the Judge) is that lode mining claims will not support a claimant's contention that decorative building stone has been discovered since such may be locatable only under the placer mining laws, 30 U.S.C. § 161 (1976), and only where such stone is shown to be an "uncommon variety" within the meaning of section 161. United States v. Melluzzo 38 IBLA 214, (1978); United States v. Chartrand, 11 IBLA 194, 80 I.D. 408 (1973).

[6] Appellants contend that their stone is an "uncommon variety," with a unique and special value. On page 18 of the statement of reasons, they recite the attributes which they urge meets these tests. The stone is asserted to be shiny and platey, lustrous, easy to work, and unique in Juneau. It would bring a royalty of \$1 per square foot. Appellants refer to the testimony of a stone mason who was obtaining similar stone from Seattle. He testified he would pay appellants the same price for their stone as he was paying for the Seattle stone.

The Judge did not err in concluding from such evidence as this that no special value was proved. Appellants did not demonstrate that: (1) the deposit has a unique property, or (2) the unique property gave it a distinct and special value. See United States v. Bolinder, 28 IBLA 187, 83 I.D. 609, (1976); United States v. Pope (On Reconsideration), 27 IBLA 133 (1976); United States v. Beal, 23 IBLA 378 (1976). The evidence marshalled by appellants, although voluminous, falls short of meeting the standards of uncommon variety and special value repeatedly set out in the decisions of the courts and of the Board. ^{3/}

[7] Appellants contend that certain quartz found on the claims could be sold to rockhounds and tourists as novelty items. The lure of these specimens was described by Mr. Henri who testified that he had never seen any quartz bits as "goodlooking" as the samples introduced from the claims (Tr. 161). However, appellants have brought forth no evidence demonstrating a special property which would make the quartz uncommon. In absence thereof it is not locatable under the mining law. United States v. Coleman, 390 U.S. 599 (1958); United States v. Mansfield, 35 IBLA 95 (1978).

^{3/} A building stone found to have unique properties was discussed in United States v. McClarty, 17 IBLA 20 (1974). McClarty states, *inter alia*, that there must be a comparison of the stone with similar stone to determine whether the stone has a property giving it a distinct and special value. Appellants circumvent the comparison requirement by asserting simply that no similar stone exists in the area (Statement of Reasons p. 19).

[8] Appellants also argue that the Judge disregarded 30 U.S.C. § 38 (1976) whereby a person or association may establish a right to patent lands which such person or association has held and worked for a period equal to the statute of limitations for mining claims of the state or territory where the claims are situated.

Appellants, who claim adverse possession for 30 years, cite this statute as authority for the proposition that the claims may not be held invalid because they were located as lode claims.

No such determination is made in the decision appealed from. In any case the purpose of 30 U.S.C. § 38 is to obviate proving formal compliance with requirements for locating a claim, not to dispense with proof of discovery. United States v. Haskins, 505 F.2d 246 (9th Cir. 1974); United States v. Johnson, 39 IBLA 337 (1979).

On page 18 of his decision the Judge made the finding that there were no representative gold or silver values disclosed by the claimants. Appellants have quoted the salient paragraph from the decision and followed it with a tabulation of most of the evidence pertaining thereto. The testimony and data cited by appellants was fully considered and correctly evaluated by the Judge. Appellants simply did not prove a viable discovery of gold or silver.

Department counsel urges the Board to consider the remaining charges in the complaint in the interest of avoiding "piecemeal litigation" and "to see that the law is carried out," inter alia, since the Board may properly make initial findings of fact on matters not considered by a hearing officer.

It is suggested that the Boston King and Dewey claims were forfeited for failure to perform assessment work between 1907 and 1938. In addition these claims are asserted to be void ab initio since they were located on land segregated by state selections. The Salmon Creek claims are said to be subject to cancellation for failure to comply with annual assessment requirements in 1943-1950 and 1952-1963. Also, these claims were null and void, it is asserted, because they were located within a powersite reserve.

All of these questions are of academic interest. 4/ They would have provided matters for the original jurisdiction of the Bureau of Land Management, and, in view of the dates, the Bureau's predecessor. No purpose would be served by any appellate dissection thereof. 5/

4/ The discussion of which yields results analogous to those produced by flailing a dead horse or tilting at a windmill like Don Quixote.

5/ Despite the pejoratives in the concurring opinion, I note that the concurring also omits discussing the issues she deems worthy of discussion by the majority.

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.

Frederick Fishman
Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge

46 IBLA 227

ADMINISTRATIVE JUDGE THOMPSON CONCURRING IN THE RESULT:

I do not share in the contumelious and obfuscous treatment by the majority of appellee-contestant's request that this Board decide the issues raised by charges in the contest complaint which were not ruled upon by the Administrative Law Judge. In a motion filed October 3, 1979, appellant-contestee joined in the request, specifically making a motion that this Board rule on those issues. Because the majority refuses to rule on the issues, which are complex, no useful purpose would be served by expressing my views at this time. I concur in the result reached by the majority because I agree with the findings of the Administrative Law Judge and his conclusion that the claims are null and void.

Joan B. Thompson
Administrative Judge

September 26, 1984

IBLA 79-471 (Supp.) : Contest No. AA-9594
: :
UNITED STATES : Mining Claims
: :
v. :
: :
JOSEPH R. AND ALETHA HENRI :
(ON JUDICIAL REMAND) : Further Hearing Ordered

ORDER

On March 27, 1980, this Board issued a decision affirming and adopting the decision of Administrative Law Judge E. Kendall Clarke, declaring certain lode mining claims owned by Joseph R. and Aletha Henri (contestee) null and void for failure to make a discovery of a valuable mineral deposit. United States v. Henri, 46 IBLA 221 (1980).

On March 26, 1982, the Federal District Court for the District of Alaska issued a decision generally affirming the Board's and Judge Clarke's decisions. However, the Court ruled that there was not substantial evidence in the record to support the finding that "cerousite slate" ^{1/} was not an uncommon variety of building stone with a unique or special value. The Court remanded the matter for reconsideration of whether there was "an adequate location and discovery of building stone after July 23, 1955." It directed that "[o]n remand [the administrative law judge] should take additional evidence, if necessary, on the question of whether the building stone had some property giving it a distinct and special value and to consider that evidence in light of [McClarty v. Secretary of the Interior, 408 F.2d 907 (9th Cir. 1969)]." The Court also noted that the administrative law judge may also "wish to consider any intervening rights which might affect the outcome," and that he "is free on remand to undertake such further proceedings as he may believe appropriate." Henri v. Andrus, Civ. No. A 80-124 (D. Alaska Mar. 26, 1982).

^{1/} Judge Clarke's decision referred to the mineral in question as "cerousite slate." The Board, however, noted that "cerousite" was not listed in A Dictionary of Mining Mineral and Related Terms, and that it was likely that, as contestee stated, the mineral is properly referred to as "sericite slate." United States v. Henri, *supra* at 224 n.2.

On January 31, 1983, and February 28, 1983, respectively, the United States Court of Appeals for the Ninth Circuit entered an order and judgment dismissing contestee' appeal of the District Court decision for lack of jurisdiction. Henri v. Watt, No. 82-3306 (9th Cir. Feb. 28, 1983).

On August 16, 1984, BLM, through counsel, filed with the Board its report recommending three procedures on judicial remand. Contestee have neither objected to these recommendations nor filed counter-recommendations. We shall address each in turn:

(1) Require the ALJ to hold a hearing and render a decision on the issue of whether there was on U.S. Mineral Survey 955 after July 23, 1955, an adequate location for and discovery of building stone having some property giving it a distinct and special value under the guidelines of McClarty v. Secretary of the Interior, [supra,] and subsequent decisions binding on the Department of the Interior.

This recommendation is accepted.

(2) Require the ALJ to decide, on the basis of the record made in the original administrative hearing * * * all of the remaining issues raised by Government in charges (b) through (1) of paragraph 5 of its administrative contest complaint, including those issues relating to intervening rights and failure to perform annual assessment work requirements.

As BLM points out, both BLM and contestee had requested this Board to address these issues when this matter was last before it. However, the majority, over the objections of a special concurree, denied this request, noting that adjudication these questions would be purposeless. United States v. Henri, supra at 226. In view of the comments of the District Court concerning the administrative law judge's considering "any intervening rights," we concur with BLM's recommendation that he rule on all remaining issues in this proceeding. However, the administrative law judge may proceed to take testimony on these issues, if he so desires.

(3) Establish a schedule * * * for expediting the Department's compliance with the District Court's remand order prior to trial of the companion mineral trespass case against the Contestee (United States v. Henri, Civ. No. A-77-229) for removal of material from U.S. Mineral Survey 955. Since the validity vel non of the mining claims * * * is also a material issue in the trespass case, resolution of the issue prior to the trial of the trespass case (presently set for January 14, 1985) would substantially advance progress in the trespass case. (with less expense)

* * * Even if the time requirements in the rules of practice * * * would not permit scheduled completion of the administrative process prior to the January 14, 1985, trial setting, an expedited schedule may serve as justification to the Court for a continuance of the trial until the schedule completion of the Department's compliance with the remand order.

The Board did not receive the case record on remand until August 16, 1984. Nevertheless, we agree that expeditious treatment of this matter is appropriate. However, as BLM notes, it is unlikely that a hearing could be scheduled and legal presentations completed before the January 14, 1985, trial setting. Accordingly, the Hearings Division should schedule this matter as soon as possible, without diminishing the parties' rights to present evidence and legal argument.

Accordingly, this matter is referred to the Hearings Division for assignment to an administrative law judge to conduct a hearing in accordance with this order and to issue a decision ruling on all pending questions of law. In the absence of an appeal by either party under the provisions of 43 CFR 4.411, the decision of the administrative law judge will be final for the Department.

Wm. Philip Horton
Chief Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Bruce R. Harris
Administrative Judge

APPEARANCES:

Eugene F. Wiles, Esq.
Delany, Wiles, Moore, Hayes & Reitman, Inc.
1007 W. 3rd Avenue, Suite 400
Anchorage, Alaska 99501

James R. Mothershead, Esq.
Office of the Regional Solicitor
U.S. Department of the Interior'
701 C Street, Box 34
Anchorage, Alaska 99513

