

UNITED STATES

v.

ALBERT MARTINEZ ET AL.

IBLA 79-332

Decided August 29, 1980

Appeal from decision of Administrative Law Judge Sweitzer dismissing contest against the Martinez Nos. 1, 2, 3, and the south half of No. 4 placer mining claims. WY 38131.

Affirmed.

1. Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Determination of Validity--Mining Claims: Discovery: Marketability--Surface Resources

Sec. 3 of the Surface Resources Act of July 23, 1955, 69 Stat. 368, 30 U.S.C. § 611, declared that common varieties of sand and gravel are not valuable mineral deposits under the mining laws. In order for a claim for such material to be sustained as validated by a discovery, the prudent man-marketability test of discovery of a

valuable mineral deposit must have been met at the date of the Act, and reasonably continuously thereafter.

2. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally--Mining Claims: Discovery: Marketability

The prudent man test of discovery has been satisfied where minerals have been found in sufficient quantity and of sufficient quality 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 marketability refinement of the prudent man test of discovery requires that the mineral locator must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the mineral deposit is of such value that it can be mined, removed and disposed of at a profit.

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

When the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it has assumed the burden of going forward with sufficient evidence to establish a prima facie case. Where a Government mineral examiner testifies that he has examined a claim and found the quantity of minerals insufficient to support a finding of discovery, a prima facie case of invalidity has been established and the burden shifts to the claimants to show by a preponderance of the evidence that a discovery has been made.

4. Administrative Procedure: Hearings-- Mining Claims: Contests-- Mining Claims: Discovery: Marketability

Where there is not sufficient reason shown to disturb an Administrative Law Judge's finding that the prudent man-marketability

test was met as of July 23, 1955, and continuously thereafter by mining claimants who extracted and profitably sold sand and gravel from the claims prior to that date and continuously thereafter, the decision will be sustained on appeal.

5. Administrative Procedure: Hearings--Mining Claims: Contests--Mining Claims: Discovery: Marketability--Rules of Practice: Hearings

The Board of Land Appeals will not order a further hearing in a mining claim contest case where a patent application has been filed merely because the evidentiary record is inadequate to invalidate the claims for lack of a discovery of a valuable mineral deposit, if the claimant is found to have met the discovery test.

APPEARANCES: Paul J. Hickey, Esq., Rooney, Horiskey, Bagley & Hickey,

Cheyenne, Wyoming for contestees; Patricia Boleyn Walker, Esq., Office of the Solicitor, U.S.

Department of the Interior, Denver, Colorado, for contestant.

#### OPINION BY ADMINISTRATIVE JUDGE THOMPSON

The United States of America, contestant, appeals from the decision, dated March 12, 1979, of Administrative Law Judge Harvey C. Sweitzer dismissing appellant's contest complaint against Albert and Maximilian Martinez, contestees, as to the Martinez Nos. 1, 2, 3, and the south half of No. 4, placer mining claims. The 4 claims, situated in sec. 24, T. 22 N., R. 86 W., sixth principal meridian, Carbon County, Wyoming, were located for sand and gravel on June 18, 1955,

35 days prior to enactment of the Act of July 23, 1955, 69 Stat. 368, 30 U.S.C. § 611 (1976), which removed common varieties of sand and gravel from mining location.

In 1966, BLM instituted contest proceedings against Martinez claim No. 4. On March 27, 1970, the Hearing Examiner, L. K. Luoma, 1/ found that there was a discovery of a valuable mineral deposit on the claim prior to July 23, 1955, and that the discovery continued to exist to the time of the decision. 2/ Following submission of patent applications for all 4 claims, BLM issued a contest complaint against the claims December 12, 1975. A hearing was held before Judge Sweitzer on December 21 and 22, 1977, in Cheyenne, Wyoming.

The parties stipulated to the issues to be resolved at the hearing. They were:

1. Whether the lands included in the South Half of Martinez No. 1, the North Half of Martinez No. 3, and the North Half of Martinez No. 4 placer mining claims are nonmineral in character in accordance with the application of the 'Ten Acre Rule'.

2. Whether the sand and gravel contained within the subject claims is locatable under the mining law, or whether the material is suitable only for fill purposes, road base or comparable use.

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1/ The Civil Service Commission changed the title of Hearing Examiner to Administrative Law Judge on August 19, 1972. 37 FR 16787.

2/ United States v. Albert Martinez and Max Martinez, Wyoming Contest No. 0252640, March 27, 1970.

3. Whether the Contestees have discovered valuable minerals within the limits of Martinez No. 1, Martinez No. 2, and Martinez No. 3 placer mining claims.

4. If a discovery of a valuable mineral has been made within the limits of the subject claims, whether said discovery has continued from the date of location to the present time with regard to Martinez No. 1, Martinez No. 2, and Martinez No. 3 placer mining claims and from March 27, 1970, to the present time with regard to Martinez No. 4 placer mining claim.

Decision, p. 3.

At the hearing the Government mineral examiner testified that he examined the claims, studied the market and concluded that a prudent person would not be justified in spending time and money in developing these claims. The contestees produced two expert witnesses, a registered engineer and surveyor, and a consulting geologist, both of whom concluded, after examining the claims, that a person would have a reasonable prospect of developing a profitable mining operation on the claims. Albert Martinez, one of the contestees, testified that he and his brother Maximilian had operated the claims continuously since June 1955, deriving most of their income from the claims. Judge Sweitzer ruled that the Government established a prima facie case of no discovery but the contestees satisfied their burden of showing by a preponderance of the evidence that a discovery of a valuable mineral deposit was made prior to July 23, 1955, and continued to the time of the hearing on all 4 claims, excepting the north half of Martinez claim No. 4 which contestees conceded is not mineral in character.

On appeal, appellant contestant challenges the sufficiency of contestees' evidence to meet the contestees' burden of proof, pointing to their failure to provide a detailed cost analysis comparing expenses and earnings. Contestant argues that its expert used market figures supplied by the State of Wyoming and his own estimates of quantity in concluding that the claims could not be mined at a profit. Contestant asserts that contestees failed to supply the specific, probative evidence of a valuable mineral discovery necessary to overcome the Government's prima facie case. Contestant reiterates its contention that the south half of claim No. 1, and the north half of claim No. 3 are nonmineral in character. Finally, contestant asks for a further hearing in the event this Board finds the evidence inadequate to invalidate the claims. Contestant submitted no offer of additional proof in support thereof.

Contestees' answer to the statement of reasons pointed to Albert Martinez's testimony concerning his earnings from the claims and to an asserted lack of foundation for the cost analysis relied on by contestant as grounds to affirm the decision below. Contestees assert that the evidence shows the claims have been operated at a profit for 24 years and that they have met the requirements of law for patents.

[1] Section 3 of the Surface Resources Act of July 23, 1955, 69 Stat. 368, 30 U.S.C. § 611 (1976), declared that common varieties

of sand and gravel and certain other materials are not valuable mineral deposits under the mining laws (30 U.S.C. § 22 (1976)); United States v. Coleman, 390 U.S. 599 (1968). In order for a mining claim for a common variety of sand or gravel located prior to the Act of July 23, 1955, to be sustained as a claim validated by a discovery, the prudent man- marketability test of discovery of a valuable mineral deposit must have been met at the time of the Act, Barrows v. Hickel, 447 F.2d 80, 82 (9th Cir. 1971); Palmer v. Dredge Corp., 398 F.2d 791, 795 (9th Cir. 1968), cert. denied, 393 U.S. 1066 (1969), and reasonably continuously thereafter. United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975); State of California v. Doria Mining & Engineering Corp., 17 IBLA 380 (1974).

[2] The prudent man test requires a showing of minerals in sufficient quantity 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.' Castle v. Womble, 19 L.D. 455, 457 (1894), approved in Chrisman v. Miller, 197 U.S. 313, 322 (1905). The marketability refinement of the prudent man test requires that the claimant show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the mineral deposit is of such value that it can be mined, removed and disposed of at a profit. United States v. Coleman, supra; Solicitor's Opinion, 54 I.D. 294, 296

(1933), approved in Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959), and recognized in Verrue v. United States, 457 F.2d 1202 (9th Cir. 1972).

[3] In a mining claim contest, the Government has assumed the burden of going forward with sufficient evidence to establish a prima facie case. The testimony of a Government mineral examiner that he has examined the claim and found the mineral value insufficient to support a finding of discovery establishes the prima facie case and shifts the burden to the claimant to show by a preponderance of the evidence that a discovery has been made. United States v. Taylor, *supra*.

At the hearing, Larry Steward and Frederick Georgeson, BLM mineral specialists, testified for contestant. Most of the contestant's case was based on Steward's expert opinion. He examined the claims in 1974 and 1975. His testimony is summarized by Judge Sweitzer as follows:

During part of these examinations he was accompanied by Albert Martinez, one of the Contestees. Mr. Martinez identified places on the claims where samples of the sand and gravel should be taken. Mr. Steward noticed numerous holes or pits on the various claims which were identified and noted on a map of the claims. (Ex. 4.) Some of the pits showed evidence of having had material removed from them recently, while others displayed no activity for a considerable period and some were essentially depleted of any sand and gravel deposits they may have contained. (Tr. 21, 24, 29, 30).

Mr. Steward testified to having taken 'enough samples to get a representative idea of the sand and gravel deposits' located on the claims. (Tr. 30). On the basis of his physical examination of those samples, Mr. Steward concluded that the materials from the deposit have no 'special unique physical characteristics.' 2/ (Tr. 52.)

No samples taken from the 1974 and 1975 examinations were received in evidence nor was there evidence of any laboratory analyses concerning the quality of the mineral. Also, no scientific estimate of quantity of material was made by Mr. Steward on the Martinez claims nor on other competing deposits in the market area of the claims. (Tr. 63-66.) Nevertheless, Mr. Steward concluded that the mineral deposits on the claims were not essentially different from other deposits of sand and gravel in the area. See e.g. Tr. 61.

Mr. Steward testified to having made a market study in the area. He concluded that there was a market for sand and gravel for use as concrete aggregate, mortar sand, and fill material in the Rawlins, Wyoming, trade area, which would constitute the general market area for the contested claims. He indicated, concerning three representative years, that the Martinez operation, presumably the four contested claims, supplied 15 percent of this total market demand in the area of approximately 14,000 cubic yards in 1955; 7 percent of the market demand totaling approximately 20,000 cubic yards in 1966; and less than 2 percent of the market demand totaling 34,000 cubic yards for 1974. (Tr. 76 78.) The market figures were assertedly obtained from the State Inspector of Mines and the Ad Valorem Tax Division of the State of Wyoming. Further foundation as to how the market figures were arrived at was not developed on the record. The Martinez production figures were based upon examination of the Martinez records, Exhibits I, N W. This information indicates that, in addition to the three representative years discussed above, some materials were marketed yearly from the time of the claims' location in 1955 until the time of hearing.

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2/ As the claims were located prior to the Act of July 23, 1955, supra, it is not necessary that the materials have 'distinct and special value' to remove them from the effect of the Act as it pertains to the location of common varieties of sand and gravel. That is, if the materials on the claims have sufficient quality to have been marketable from the time of their discovery to the present, the claims are not invalid for lack of 'distinct and special value.'

Mr. Steward gave his opinion concerning whether or not the claims could be operated at a profit. From his examination of the Martinez books and his knowledge of market conditions, he made an economic study of the claims. He concluded that, had the sole source of income been the sand and gravel from these claims, the Martinez operation would have lost 20 cents per cubic yard of material sold in 1955 and at least 80.7 cents per cubic yard in 1977. His conclusion was based upon an allocation of equipment costs according to acquisition costs supplied by Albert Martinez (Tr. 80), labor costs in the mine on an assumption that one full-time employee would be required eight hours per day and five days per week (Tr. 91), and did not include indirect costs such as permits, taxes, or insurance. (Tr. 92-93.) The exact costs of labor and equipment depreciation were not entered in the record. On this basis Mr. Steward concluded that a person of ordinary prudence would not be justified in expending further time and monies with a reasonable prospect of success in developing a paying mine on the claims. (Tr. 123.)

Decision, pp. 4 and 5.

Appellant disputes one specific finding made by Judge Sweitzer, namely, that Mr. Steward did not make a scientific estimate of quantity of material on the claims and on other competing deposits in the market area. It is apparent he did not estimate other competing deposits. However, he did estimate a quantity of sand and gravel material on the claims which is quite close to that of contestees' witness, except as to claim 3 (see quotation, infra). Thus, Judge Sweitzer's decision is corrected to reflect this estimate found at Tr. 99, as follows for each claim: 36,300 cubic yards on the Number 1 claim; 29,000 cubic yards on Number 2; 21,780 cubic yards on the Number 3; and 25,000 cubic yards on the Number 4. The Judge found that the contestant had established a prima facie case that there has

been no discovery of a valuable mineral deposit on each of the claims based upon Steward's opinion. He found, however, that there was a lack of foundation as to the basis of the opinion that the mining operations could not be profitable and stated that this detracts from the weight given to it. He found that contestees' evidence preponderated on the issue of marketability at a profit.

He summarized the contestees' evidence as follows:

Mr. Robert Jack Smith, a registered professional engineer and land surveyor from Rawlins, Wyoming, testified as an expert witness for Contestees. Mr. Smith surveyed the claims in 1955 and inspected the claims in 1969 and in 1977 and was familiar with the history and present condition of the contested claims. He estimated that at least the following quantities of sand and gravel existed on the claims at the time of the hearing: 30,000 cubic yards on Martinez No. 1; 31,000 cubic yards on Martinez No. 2; 38,000 cubic yards on Martinez No. 3; and 23,000 cubic yards on Martinez No. 4. (Tr. 207-208.) He testified that the Rawlins area was experiencing tremendous growth and that the demand for construction materials was very high. (Tr. 208-214.) He stated that based upon the existence of a market for the materials and the deposit on the claims being of a nature which lends itself to economical mining, he would advise a person to invest money and labor in developing the claims. (Tr. 216-217.) [See also Tr. 233-234.]

Mr. James Elliott also testified for Contestees. Mr. Elliott is a consulting geologist from Laramie, Wyoming, with an extensive educational background in hydraulics and soil mechanics. (Tr. 237.) He has analyzed the quantities and quality of sand and gravel deposit with the Wyoming Highway Department. (Tr. 238.) He examined excavations on all four claims in November 1977 and concluded that from the nature of the deposits a person would have a reasonable prospect of developing a profitable mining operation on the claims.

Mr. Albert Martinez, one of the two Contestees testified. He related that his initial discovery was in June 1955 and testified that he marketed sand and gravel from

the claims prior to the effective date of the Act of July 23, 1955. He testified that he and his brother (the other Contestee) have been operating the claims continuously since their location (Tr. 281) and he estimated that he could continue the operation for an additional ten to fifteen years (Tr. 288).

Recent claim activities related by Mr. Martinez (and partially substantiated by written receipts) indicate rather significant operations. He stated that \$15,732 had been derived from the claims for the first ten months of 1977. (Tr. 314 and Ex. W.) These figures reflect income before deduction of expenses. Overhead expenses were not recorded in Contestees' ledgers and net profit calculations were mere estimates. Nevertheless, Contestees estimated that most of their income came from operation of the claims through the sale of sand and gravel and the hiring out of themselves and the equipment otherwise used to operate the claims. They did not submit expenses records for claim operations nor did they allocate expenses and depreciation between the sale of materials and the hiring out or rental of equipment.

Since part of Claim No. 3 and all of Claim No. 4 are east of the river, it may not be mined year-round because of access problems. According to Mr. Martinez, material nevertheless may be marketed from this area by stockpiling material on the west side of the river when the river is low and easily fordable. (Tr. 285.)

Decision, pp. 5-7.

[4] The Judge's ultimate finding is that the contestees by their actions have shown that a profit has been made from mining the claims from 1955 to the time of the hearing and that they are justified as prudent men in the further expenditure of time and means in operating the claims. In reaching this conclusion, the Judge stressed that the best evidence of what a prudent man would do in the same or very nearly the same circumstances is what miners have or have not done over a period of years. See United States v. Wichner, 35 IBLA 240

(1978). Thus, he gave greater weight to the contestees' evidence that they had made a livelihood from the claims than to the mineral examiner's opinion which was based upon hypothetical calculations, without a full disclosure of figures to show the analysis (see Tr. 74-92). Such a weighing is appropriate.

We see no reason to overturn the Judge's findings in this case based on the record before us, despite appellants' contentions that the Judge did not give adequate weight to Steward's expert opinion. We cannot agree that the Judge misapplied the law of discovery and the burden of proof to the facts here. We note that there is no evidence of lack of good faith on the part of the contestees and no evidence showing any value in the land apart from the sand and gravel deposits within the claims. The evidence does not establish that the material was used for purposes for which nonlocatable mineral could be used which would not be considered as qualifying uses.

This case is different from many other sand and gravel cases where there has been little, if any, actual extraction of the materials before and for a long time after 1955. Here there were actual sales prior to July 23, 1955, and continuous sales each year thereafter to the date of the hearing. It is clear that the market demand for sand and gravel in the area is continuing and greatly increasing. Although by Steward's calculations, appellants' percentage of capture of the market demand in the area has diminished from 15 percent in

1955, to 7 percent in 1966, to less than 2 percent for 1974, this does not establish that a prudent man would not expect to market the sand and gravel profitably as of the time of the hearing. Steward admitted there is adequate access to the claims 3/ (Tr. 130) and that the market for sand and gravel in the area has been increasing steadily (Tr. 74-78). There was un rebutted evidence by contestees that sand from the claims is suitable for mortar purposes, that other sources of sand and gravel in the area cannot supply sand suitable from mortar as good as that from the claims, and that the projected market for mortar sand is excellent due to expected growth of population in the area and projected construction projects.

Much of the objection raised by appellant is with the lack of detailed evidence by contestees of the costs of their operations. The Judge explained the discrepancy between contestant's and contestees' evidence on profitability in large part because of a difference in accounting and cost allocation. He concluded that the contestant's costs were not appropriate because they were based on a more continuous and larger mining operation than that actually conducted by contestees. This made a great difference in apportioning labor costs and the amortization of equipment. Although the Judge found that contestees did not allocate expenses and depreciation between the sale of materials and the hiring out or rental of equipment, there was a

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3/ With the exception of the north half of claim No. 4.

rough estimate by Albert Martinez regarding income which would bear upon cost allocation. He testified that 90 percent of his income came from the contested claims (Tr. 283), with a profit sufficient to make a living (Tr. 309). In 1954 and 1955 about 10 percent to 15 percent of the sales of sand and gravel came from another property (Tr. 326, 366). He also testified he had purchased equipment from the income received from his sales of sand and gravel. The income from the contestees' total operations are reflected by the ledger books submitted as exhibits at the hearing (Exhs. I, N W). Some expenses are reflected there, such as repairs on equipment, but not costs of equipment. While their bookkeeping system does not clearly show their net income for the years, it does evidence consistent sales with a reasonable gross income for a small sand and gravel operation since 1955.

Judge Sweitzer had the opportunity of personally observing the demeanor of the witnesses. He accepted and gave great weight to Albert Martinez's testimony that he and his family had made a good livelihood from the sand and gravel operations from the claims, and that the operation was profitable and could continue to be profitable. We see no adequate reason for disturbing the Judge's findings that the prudent man-marketability test was satisfied here and that the contestees have met their burden of proof for claims Nos. 1, 2, 3, and the south half of No. 4. Therefore, his decision is sustained on appeal. The evidence shows excavations of sand and gravel on the south half of No. 1 and north half of No. 3, refuting the assertion

that the land is nonmineral in character. The evidence shows no excavations on the north half of claim No. 4; contestees conceded that the land was nonmineral in character and that determination will stand.

[5] The remaining issue concerns appellant's request that if the Board finds 'the evidentiary record is inadequate to invalidate the claims, it is respectfully requested that the case be remanded for further hearing.' The only justification for this request is the fact a patent application for the claims has been filed. Appellant cites United States v. Taylor, *supra*, and also United States v. Guzman, 18 IBLA 109, 81 I.D. 685 (1974). In United States v. Taylor, we addressed the circumstances where a patent application has been filed in relation to the burden of proof question and stated, at 19 IBLA 25, 26, 82 I.D. 74:

If a patent application has been filed, it is essential for this Department to determine whether all the requisites of the law have been met before patent may issue. If there has not been evidence presented on an essential issue, or issues, dismissal of the contest will not fulfill this Department's obligation to act 'to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved.' Cameron v. United States, 252 U.S. 450, 460 (1920). Therefore, in a patent proceeding, it would be essential to order a further hearing to make a proper determination on the essential issues.

Appellant seems to be saying that in every patent application case if this Board cannot find the claim invalid because of a lack of discovery of a valuable mineral deposit, we must order a further hearing.

This is incorrect and is not what United States v. Taylor holds. As the statement quoted above clearly shows, a hearing is essential if there has not been evidence presented on an issue, or issues, essential to determine the validity of the claim. Appellant has pointed to no such issue. It points only to deficiencies in contestees' case concerning the costs of their mining operation. This goes to an aspect of the discovery test. While specific detailed information was lacking, there was evidence that contestees' operations were profitable and expert opinion testimony that a prudent man could profitably operate the mine. The Judge weighed all of the evidence and made his findings on the prudent man-marketability test of discovery as of July 23, 1955, and as of the date of the hearing. If there had been no evidence to show the test was met as of either July 23, 1955, or through the date of the hearing, which are separate issues, a further hearing would be appropriate. However, evidence was presented relating to the application of the tests as of those dates and the time between those dates. If there is some other issue which has not been raised before in this contest proceeding which is essential to the patentability of these claims, it is incumbent upon contestant to take appropriate action to raise such an issue. None has been brought to our attention. Without more being shown to warrant a further hearing, we see no justification for ordering one in these circumstance. Therefore, the request for a hearing is denied.

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

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Joan B. Thompson  
Administrative Judge

We concur:

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Joseph W. Goss  
Administrative Judge

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Anne Poindexter Lewis  
Administrative Judge

