

UNITED STATES
v.
ESTELLA M. KINCANON ET AL.

IBLA 76-221

Decided April 15, 1981

Appeal from Chief Administrative Law Judge L. K. Luoma's decision in contest No. A 2201 dismissing the complaint, declaring the Kincanon No. 1 placer mining claim to be valid, and allowing issuance of patent if all else be regular.

Affirmed.

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

The Surface Resources Act of July 23, 1955, declared that common varieties of sand and gravel are not valuable mineral deposits under the mining laws. In order for a mining claim for such material located prior to the date of the Act to be sustained, the prudent man marketability test of discovery of a valuable mineral deposit must have been met at the date of the Act, and maintained reasonably continuously thereafter.

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

Under the "prudent man test" in order to qualify as "valuable mineral deposits" the disputed deposits must be of such a character that a person of ordinary

prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. To qualify as "valuable mineral deposits" under the "marketability test" it must be shown that the minerals can be "extracted, removed and marketed at a profit."

3. Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Determination of Validity--Mining Claims: Discovery: Marketability

In determining whether or not a mining claim is valid, the marketability test requires that there be, at the time of discovery, a market for the discovered material that is sufficiently profitable to attract the efforts of a person of ordinary prudence. In determining marketability, evidence of sales is only one factor to be considered in the application of the prudent man marketability test.

APPEARANCES: Demetrie L. Augustinos, Esq., Office of the General Counsel, U.S. Department of Agriculture, Albuquerque, New Mexico, for appellant; Hale C. Tognoni, Esq., Phoenix, Arizona, for appellees.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

The U.S. Department of Agriculture has appealed from the decision dated August 5, 1975, by Chief Administrative Law Judge (Judge) L. K. Luoma, dismissing the complaint in contest A-2201, declaring the Kincanon No. 1 placer mining claim to be valid, and allowing issuance of patent if all else be regular.

The case arose under a mining contest (A-2201) brought by the Bureau of Land Management (BLM), Department of the Interior, at the request of the Forest Service, Department of Agriculture. The complaint alleged, in essence, that the Kincanon No. 1 placer mining claim was invalid because there is no valid discovery of valuable mineral deposit within the limits of the claim. The material of the claim is a rock primarily used as a coarse concrete aggregate.

On March 7, 1972, then Hearing Examiner 1/ L. K. Luoma issued a decision in contest A 2201 in which he held: (1) The area embraced by

1/ The title "Hearing Examiner" was supplanted by the title "Administrative Law Judge" by order of Civil Service Commission. 37 FR 16737 (Aug. 19, 1972).

mineral survey 4652 conforms to the area monumented and claimed by the original locator in 1943, and that contestees hold possession of the claim by virtue of the original location notice as amended; (2) the evidence supports a finding that the claim contains a deposit of valuable stone which has been marketed profitably since 1943, and which could reasonably be expected to be marketed profitably in the foreseeable future; therefore, contestee had a discovery and patent should issue if the application in other respects is in proper order.

On September 26, 1973, this Board issued a decision affirming as correct the holding in (1) above by the Administrative Law Judge and remanding for a further hearing on (2) the issues of whether the mineral material on the claim is a common variety under 30 U.S.C. § 611 (1976), and marketability at a profit of the mineral material as of July 23, 1955, and continuing to the present time.

In remanding the case the Board specified that anyone who located a claim prior to July 23, 1955, for a common variety of sand, stone, and gravel must show that all requirements for discovery, including that the materials could have been extracted, removed, and marketed at a profit, had been met by that date and thereafter. Specific information sought from the second hearing was additional evidence relating to marketability at a profit as of July 23, 1955, and thereafter to the present, and whether the rock is a common variety. Needed was information showing whether there was an actual market for the material from this claim during the periods of no production or sales, and the reasons, if any, for the claimants' failure to capture a portion of that market.

On August 5, 1975, the Administrative Law Judge issued his decision following a hearing on the remand. Here he found (1) the stone involved is a common variety; and (2) there was a discovery of a valuable mineral deposit on the claim on and prior to July 23, 1955.

The new evidence relating to marketability produced at the second hearing consisted of Exhibit R-1, a supplement to affidavit of possession and work performed. Contestant was given the opportunity to examine the Kincanon books from which the information in Exhibit R-1 was taken and to submit an affidavit in opposition. However, contestant elected not to file any opposition to Exhibit R-1. The parties stipulated that no further evidence would be offered by either side and that a complete record had been made previously.

The question now before the Board is whether we have the required evidence to determine if contestants had a discovery of the common variety mineral as of July 23, 1955, and, if so, whether the conditions supporting discovery have continued to the present time.

The only new evidence is Exhibit R-1, which is not disputed in any way by contestant and therefore will be taken as admitted. This exhibit, an affidavit from contestee David Kincanon, expressly shows

"that overall, from the period 1966-1974, the property [Kincanon No. 1 placer mining claim] produced a total of \$ 55,807.60, plus the additional royalty payable at \$ 260 per month through December, 1976, making a total of \$ 62,047.60," and all funds were profit.

[1, 2, 3] In our 1973 decision we set forth, as stated by the Administrative Law Judge, the available data about production and sales up to 1966. See United States v. Kincanon, 13 IBLA 165 at 173-74 (1973). Although the hearing on remand did not produce the information we had sought, we now have before us both the evidence produced at the first hearing and the information set forth in Exhibit R-1, which contestant does not dispute. In these circumstances, we find that the total evidence on behalf of the contestee is enough to overcome any prima facie case of no discovery which the contestant may have made. We find that contestees have sustained their burden of going forward and have established by a preponderance of the evidence that discovery of a valuable mineral deposit was made on the Kincanon No. 1 placer mining claim. In this respect, we adopt the findings of the Administrative Law Judge in his 1975 decision, which are:

To satisfy the direction by the Board on the common variety issue, I find that Contestees' material is, in fact, a common variety mineral. While such material is of rare occurrence around Flagstaff, Arizona, the deposit itself does not have a unique intrinsic property which gives it a distinct and special value. See United States v. O'Callaghan, 8 IBLA 324 (1972). * * *

Herein, I find that there was a discovery of a valuable mineral deposit on the claim on and prior to July 23, 1955. As the Courts have held, actual successful exploitation of a mining claim is not required to satisfy the prudent man test. Barrows v. Kickel, 447 F.2d 80, 82 (9th Cir. 1971). Therefore, it would be possible for a mining claimant to establish a discovery of a valuable mineral deposit on a claim by evidence showing that the material could have been extracted, removed and marketed at a profit before July 23, 1955. United States v. Gibbs, 13 IBLA 382, 391 (1973). Herein, Contestees produced positive evidence of the marketability of their material from 1943 until July 23, 1955. See Verrue v. United States, 457 F.2d 1202 (9th Cir. 1972), rev'g United States v. Verrue, 75 I.D. 300 (1968).

While one who has located a mining claim for a common variety mineral prior to July 23, 1955, must show a discovery of a valuable mineral deposit as of such date, he must also show that the material could have been extracted, removed, and marketed at a profit thereafter. United States v. Charleston Stone Products, Inc., 9 IBLA 94 (1973), rev'd, Charleston Stone Products Co., Inc. v. Morton, Civil No. LV-2039 BRT (November 7, 1974). * * *

It is apparent that Contestees' material is a high grade stone which has a ready market. Contestees produced evidence at the first hearing relating to sales that had been made from the claim and any presumption that may have been raised due to lack of development and sales during certain periods was rebutted by Contestees' presentation of credible evidence that the material from their claim has at all times been marketable at a profit. In addition, at the second hearing, Contestees submitted Exhibit R-1 which provides uncontested evidence that the claim provided an income of \$ 55,807.60 for Contestees during the years 1966-1974, plus an additional royalty of \$ 260 per month through December, 1976. Such evidence shows the continuity of Contestees' market for their stone.

Therefore, I find that Contestees' market continued from July 23, 1955, without substantial interruption up to the present time and that their material can reasonably be expected to be marketed profitably in the future.

I conclude that Contestees have established a discovery of a valuable mineral deposit on the Kincanon No. 1 placer mining claim and that such discovery has not been lost in the intervening years since 1943 so as to invalidate their claim.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we hereby dismiss the complaint and declare that Kincanon No. 1 placer claim is valid. We further hold that patent may issue if all else be regular.

Anne Poindexter Lewis
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Bernard V. Parrette
Chief Administrative Judge

