

UNITED STATES

v.

ONEIDA PERLITE CORP.

IBLA 79-265

Decided August 27, 1981

Appeal by the Forest Service, Department of Agriculture, from the decision of Administrative Law Judge Michael L. Morehouse holding that 580 acres were embraced in valid mining claims held by Oneida Perlite Corporation. Motion by the corporation for rehearing.

Set aside and remanded.

1. Administrative Practice -- Administrative Procedure: Administrative Review -- Appeals -- Mining Claims: Contests -- Mining Claims: Excess Reserves -- Rules of Practice: Appeals: Generally

Where, following the contest of a number of mining claims, a decision is rendered by an Administrative Law Judge holding certain claims and portions of claims to be valid and invalidating the remainder for lack of mineral or as embracing excess mineral reserves, and the Government appeals from that decision but the claimant does not, that decision will be set aside and the case remanded for rehearing

on the basis of a judicial decision in another case, made while the subject appeal was pending, that there can be no invalidation of mining claims by this Department on a finding that the claimant has acquired claims for far more mineral than the market can absorb within the foreseeable future.

APPEARANCES: Erol R. Benson, Esq., Office of the General Counsel, Department of Agriculture, Ogden, Utah, for appellant; William J. Critchlow III, Esq., Ogden, Utah, and Louis F. Racine, Jr., Esq., Pocatello, Idaho, for Oneida Perlite Corporation.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Oneida Perlite Corporation (Oneida) applied to the Bureau of Land Management (BLM), Department of the Interior, for patent of 15 association placer mining claims. 1/ The claims, which are located for the mineral substance perlite, are situated in Oneida and Bannock Counties, Idaho, and embrace an area of 2,000 acres within Caribou National Forest, which is administered by the Forest Service (FS), Department of Agriculture. 2/

1/ The subject claims are the Wright Creek Nos. 1 through 9, Wright Creek Nos. 13, 14, and 16, and placer claims P-17 through P-19, more particularly described in the patent application (Exh. G-3), the contest complaint, and exhibit "U."

2/ A 40-acre tract, (the Wright Creek No. 14 claim) apparently reserved by the United States as an administrative site, was withdrawn from the patent application by the company, leaving an area of 1,960 acres.

Disposition of federally owned minerals under the general mining law is a function of the Secretary of the Interior, notwithstanding that the land in which such minerals occur may be withdrawn for the use of another Federal agency and be administered by that agency for its own purposes. However, under the provisions of a memorandum of understanding between BLM and FS in effect since 1957, FS is authorized to conduct mineral examinations of claims on national forest lands, render reports, make recommendations concerning patent applications, or request initiation of contests of the validity of claims. Should FS recommend contest, BLM, upon its determination that the elements of a contest are present, prepares and serves an appropriate contest complaint. Upon receipt of a timely and responsive answer, the case is referred to the Hearings Division, Office of Hearings and Appeals, Department of the Interior. At the hearing, the memorandum of understanding provides that the Government will be represented by an attorney of the Office of the General Counsel, Department of Agriculture. The initial decision is made by the presiding Administrative Law Judge, an Interior employee, and either party may appeal from his decision to this Board. Thus, in the administrative process, all decisionmaking authority is reposed in officials who exercise the delegated authority of the Secretary of the Interior.

That procedure was followed faithfully in this case. Following their location by associations of individuals who conveyed the claims to Oneida, they were examined by FS minerals personnel. The first report of such examination allegedly found that all of the claims were supported by a qualifying discovery of valuable mineral deposits. A second examination was conducted by FS following Oneida's submission

to BLM of its patent application. An effort at negotiation between FS and Oneida, whereby FS would recommend part of the area for patent and Oneida would withdraw the remaining area from its patent application without prejudice to reapply in the future, failed to achieve agreement. Thereafter, FS recommended to BLM that 100 acres be approved for patent (comprised of portions of three claims), and that contest proceedings be initiated against the remaining claims and portions of claims. BLM issued and served the contest complaint; Oneida filed its timely answer; and BLM referred the case for hearing.

The case was assigned to Administrative Law Judge Morehouse, who presided over the hearing which was held in Pocatello, Idaho, on February 17 and 18, 1978. By his decision dated February 12, 1979, Judge Morehouse held that portions of six claims, aggregating 580 acres, were valid and should be patented, and that the remaining claims and portions of claims were invalid. ^{3/}

^{3/} In calculating the acreage for patent in his decision of Administrative Law Judge included 100 acres which were not part of the contest, but were, in fact, the same 100 acres which were recommended for patent by FS. Therefore, of the 1,860 acres contested the Administrative Law Judge validated 480 acres and invalidated 1,380 acres. The proper acreage figures are:

	<u>Contested</u>	<u>Validated</u>	<u>Invalidated</u>	<u>FS</u>	
		<u>by ALJ</u>	<u>by ALJ</u>	<u>Recommendation</u>	
Claim No. 1	130	90	40	30	
Claim No. 2	160	120	40		--
Claim No. 3	110	50	60	50	
Claim No. 4	140	60	80	20	
Claim No. 5	160	80	80		--
Claim No. 6	160	80	80		--
Claim No. 7	160	--	160		--
Claim No. 8	160	--	160		--
Claim No. 9	160	--	160		--
Claim No. 13	160	--	160		--
Claim No. 16	120	--	120		--
P-17	40	--	40		--
P-18	80	--	80		--
P-19	<u>120</u>	<u>--</u>	<u>120</u>		--
-	1,860	480	1,380	100	

FS appealed to this Board from Judge Morehouse's decision. Oneida did not appeal, but contented itself with filing an answer to the statement of reasons for appeal filed by FS.

The contest had proceeded on the basis of a complaint which embodied the following three charges:

- a. There are not presently disclosed within the boundaries of the mining claims or portions of mining claims, minerals of a variety subject to the mining laws sufficient in quality, quantity, and value to constitute a discovery.
- b. In the alternative, the minerals or mineral materials on the subject claims constitute excessive reserves.
- c. The land is nonmineral in character.

In commenting on these charges at the outset of his decision, Judge Morehouse made the following observation: "The only material allegations of the complaint are set out in paragraphs a and b above, since if the claims are not supported by a proper discovery or constitute excess reserves they are invalid and it is immaterial whether the land is mineral or nonmineral in character" (Decision at 2).

At the time Judge Morehouse authored the foregoing, we would have regarded it as a generally correct statement, although charges a. and b. are conceptually redundant. However, subsequent decisions by the Court of Appeals for the Ninth Circuit have made the reference to "excess reserves" an anathema, while lending enhanced significance to the term "nonmineral in character," as will be discussed, infra.

At the hearing the Government had devoted considerable effort toward establishing its contention that Oneida had located claims for far more perlite mineral than could be extracted, processed, and absorbed by the market for as far into the future as one might reasonably see. ^{4/} As the hearing progressed and evidence was adduced, Judge Morehouse commented, "However, the issue in this case, I think it's clear to everyone, is one of excess reserves" (Tr. 246). Both sides repeatedly referred to the perlite deposits on the claims as "massive," and evidence was admitted to show the extent of reserves based upon various measures such as total annual United States consumption, the current rate of production by the contestee, maximum plant capacity, etc. The FS mineral examiner testified that on the 100-acre area he recommended for patent there is in excess of 5,300,000 tons of commercial perlite which, based on the contestee's annual production, would provide a reserve for 1,000 to 1,200 years (Tr. 68). Contestee had arranged to have the claims examined by an expert in perlite who enjoys a worldwide reputation as such, Herbert A. Stein, whose report is appended to the patent application. Stein estimated the total reserves on the subject claims at 200,000,000 to 300,000,000 tons. The FS mineral examiner estimated that this is enough to supply the entire needs of the United States at current levels of consumption for "more than two or three hundred years." The

^{4/} For example, at the opening of the hearing, counsel for contestant declared: "We believe that on a hundred acres a valuable discovery had occurred, and also that on that hundred acres there is at present rate of production about -- anywhere from fifty thousand to a million years reserve supply for the company" (Tr. 8). This may have been an indulgence in hyperbole.

national rate of production was given as 602,000 tons per annum. ^{5/} In 1977, the latest year for which figures were available at the time of the hearing, 80 percent of the national output was produced in New Mexico, the remainder being produced in Arizona, California, Colorado, Idaho, and Nevada. Twelve mines were producing in those six States (Exh. G-8). The United States is an exporter to the extent of 18,000 tons per annum (Exh. G-9).

The Administrative Law Judge and FS were familiar with and guided by a decision of this Department which also was a case in which there had been multiple claims (covering 2,165 acres of land in the Santa Fe National Forest, New Mexico, and 200 acres of BLM land for vast deposits of perlite estimated at more than 25,000,000 tons). In that case, United States v. Anderson, 74 I.D. 292 (1967), the Department found that although a market exists for a certain amount of perlite, so that the claimants might mine some of it at a profit, the limitations of the market were such that it could not all be absorbed, and thus huge quantities were not marketable. In locating multiple claims for reserve deposits which were far more than needed as a reasonable reserve supply, the claimants had laid claim to "excess reserves" which had no economic worth as mineral. The mining law requires that each claim be supported by the "valuable" mineral deposit within its boundaries. 30 U.S.C. § 22 (1976). Noting that, "What must be shown is that at the present time there is an existing market and that there is a reasonable justification for believing that the product of each claim can

^{5/} Our calculations show that on this basis there is sufficient perlite on the claims to equal the entire United States production for from 332 years to 498 years, including the total domestic consumption and total exports.

be disposed of in that market at a profit," the Anderson decision held that patent could be approved only for sufficient reserves necessary to sustain a mining operation of the size contemplated for a reasonable period of time. The remaining claims were held to be invalid on the ground that there was no discovery thereon of a mineral deposit which was "valuable" in terms of present marketability at a profit.

There is such a remarkable resemblance between the circumstances which characterized United States v. Anderson, supra, and those which obtain in the case at bar that the two cases are virtually indistinguishable in any relevant particular. ^{6/} It seemed apparent that the law of the case in Anderson would apply to and control the result here.

The contestee, however, argued that its reasonable reserve requirements should not be gauged solely on the tonnage of perlite within the claims, but consideration should also be given to the fact that there are 14 different varieties of perlite with different uses and potential markets, and that the various types are not closely concentrated on any one claim but are distributed on several claims over an extensive area. Therefore, contestee said, it must have more than the area recommended for patent by FS (which contains only three types of perlite), in order to supply "any known and future use for the mineral"

^{6/} In his decision Judge Morehouse noted that the Anderson case was "considerably different" than the instant case because the Anderson claimants had not then built a mill or expanding plant or constructed roads, whereas Oneida had done so, and had sold approximately 2,500 tons of expanded perlite per year for the years 1976 and 1977. However, this distinction would have no bearing on the extent of the market, the economics of exploitation, the nature of the deposit, the quality of the mineral or the applicable law.

and impart value to the mining venture which will attract additional investment capital. For this reason, contestee argued, type-not tonnage -- is the critical consideration in calculating reasonable reserves.

Contestant countered this argument with the assertion that the evidence presented showed that only 2 or 3 of the 14 types of perlite are currently being marketed. ^{7/} It was contended that the mining law does not provide for the patenting of large acreages and vast quantities on the hope or speculation that some day a market for the other perlite varieties might be developed.

Nevertheless, Judge Morehouse was persuaded that it was appropriate to validate a sufficient area of the claimed lands to encompass all the varieties which the company said it required for an existing market and potential future markets. In doing so he expressly recognized that if all of the estimated reserves on claims 1, 3, and 4 were minable, there would be enough to operate to the total maximum capacity of the company's mill for 35 years. (The mill has a present capacity of 70,000 tons per year, but can be converted to handle 140,000 tons per year, although annual sales for the 2 preceding years (1976-77) were only 2,500 tons per annum.) However, he found that not all types

^{7/} On appeal, FS asserts that "only one or two types of perlite are presently being marketed," other than "the possible exception of the pumicite." In its answer, Oneida says, "Currently there are approximately six to seven different types of perlite being sold, but there are fourteen different types of perlite found on the 580 acres which impart to these claims the unique characteristics of being able to meet every known demand for perlite." The record does not resolve the disparity.

of perlite were present on claims 1, 3, and 4, but that other required types were present on claims 2, 5, and 6. Accordingly, Judge Morehouse held that 580 acres, comprised of portions of six claims containing all varieties of perlite, should be patented without regard for the volume of perlite within that area. ^{8/} Also included in the 580 acres ordered to patent by Judge Morehouse were the areas occupied by contestee's mill and an improved spring which contestee's president testified was desired "in case we need wet scrubbers in the mill for environmentalists" (Tr. 184-85).

The 1,380 acres occupied by the remaining claims and portions of claims which were held invalid by Judge Morehouse were eliminated for various reasons. He found that there was insufficient evidence adduced by the contestee to show that valuable deposits are present on claims 7, 8, 13, 16, P-17, P-18, and P-19, and he held that these claims are invalid for lack of discovery. Applying the "10-acre rule," under which aliquot 10-acre increments which, contain no commercial mineral can be excluded from a placer claim, Judge Morehouse eliminated the SE 1/4 of claim 1, the SW 1/4 of claim 2, the SE 1/4 and S 1/2 SW 1/4 of claim 3, and the E 1/2 ^{9/} of claim 4. Then, applying the rule relating to "excess reserves" as articulated in United States

^{8/} Actually, there is no way of knowing or estimating the quantity of perlite within that particular 580 acres, as evidence was not presented concerning the volume on each claim and each portion thereof. We can only speculate that it must exceed by several times the 5,000,000 tons included in the portion recommended for patent by FS.

^{9/} Reference to "the E 1/4 of Claim No. 4" on page 12 of Judge Morehouse's decision is an apparent typographical error. On page 15 of the decision it becomes evident that he excluded the E 1/2 of the claim.

v. Anderson, supra, Judge Morehouse concluded that 540 acres comprised of portions of claims 1, 2, 3, 4, 5, and 6, and all of claim 9 constituted locations of "excess reserves" of perlite for which there is no existing or potential market.

In its appeal to this Board from the decision of Judge Morehouse, FS maintained, inter alia, "[t]hat the reserves allowed by the Judge are greatly in excess of reasonable needs"; that his validation of claims for perlite varieties for which there is no present market was violative of the requirement that the value of a deposit be determined by whether it is presently marketable at a profit; that in awarding Oneida a portion of Wright Creek No. 2 claim for "pumicious perlite," which is used as an abrasive, the Judge erred in granting patent for a mineral which has been barred from location under the Act of July 23, 1955 (30 U.S.C. § 611 (1976)); that the patenting of a mining claim, or portion thereof, where there is no mineral in order to make provision for the site of Oneida's mill is violative of the millsite statutes, 30 U.S.C. § 42 (1976); that the allowance of a portion of Wright Creek No. 3 claim, not shown to contain commercial perlite, to accommodate Oneida's desire to have a spring, was contrary to the holding of the Supreme Court in Andrus v. Charlestone Stone Products Co., Inc., 436 U.S. 604 (1978); and that portions of claims ordered to patent by Judge Morehouse were not shown to contain commercial perlite. However, appellant's principal point of contention concerned Judge Morehouse's award to Oneida of what it asserted were excess reserves, and it relied heavily on United States v. Anderson, supra, to support its contention.

Oneida did not appeal, but responded to the appeal of FS urging the propriety of the decision of the Administrative Law Judge.

The Baker Decision

While this appeal was pending, indeed, after it had been reached for adjudication on the docket of this Board and was actually under review, the Court of Appeals for the Ninth Circuit issued its decision in Baker v. United States, 613 F.2d 224 (9th Cir. 1980). In that decision the Court held that this Board's application of the excess reserves rule, except the "too much test," exceeded the Board's discretionary and statutory powers, and amounted to a legislative enactment by an executive tribunal, was arbitrary, capricious, and an abuse of discretion. The Court held, in effect, that there can be no such thing as an "excess reserves test" or a "too much test." (Emphasis by the Court.) In so doing the Court of Appeals declared that United States v. Anderson, *supra*, and other Departmental decisions which referred to "excess reserves" or "reasonable reserves" were based upon a faulty premise. The Board's decision in that case, United States v. Baker, 23 IBLA 319 (1976), noted that the claimant had, prior to July 23, 1955, located the Wildcat Hill Nos. 1 through 5 placer claims for common cinders, and had made application for patent. At the request of FS, contest proceedings had been initiated to determine their validity and that of a sixth claim, known as the "Cinder." Subsequently, the contest proceedings against the Wildcat Hill No. 5 and the Cinder claims were dismissed, leaving only the Wildcat Hill Nos. 1 through 4 at issue. The hearing established that marketable cinders were exposed

in vast quantities on all four claims, and that a profitable market for such cinders had existed since prior to July 23, 1955. Accordingly, the Administrative Law Judge held that all four claims were valid. FS then appealed to this Board. Upon review of the record, we noted that Baker had located claims covering 15,000,000 tons of cinders by his own estimate; that his sales over the preceding 18 years amounted to from 700,000 to 1 million tons; that a substantial volume of these sales were for fill or other nonmineral purposes which could not be recognized under the holding in United States v. Barrows, 76 I.D. 299 (1969), aff'd, Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971); that at 10 cents per ton for the material, the maximum gross income from his operation was \$100,000 over the preceding 18 years, or an average of \$5,555 per annum; that the supply of cinders in the area significantly exceeded the demand; and that there were numerous competitive producers in the vicinity. Depending on the figures used for the projection, Baker's location of four claims containing 15,000,000 tons of cinders gave him a reserve supply which could not be consumed in less than 270 years and most probably would last more than 400 years. Accordingly, we held that Baker had located extra claims for "excess reserves," i.e., reserves which could not be marketed, which had no value, which no prudent man would produce, and which were therefore invalid for lack of a discovery of a valuable deposit of mineral. We held that two of his claims were valid instead of one because his main pit and principal improvements extended into both claims and we did not wish to disrupt his operation. Assuming that the 15,000,000 tons were uniformly distributed on the four claims at issue, the two claims cleared for patent by the Board's decision provided him with sufficient

reserves to supply his market from 100 to 200 years, not including his other sources.

We therefore found "that although Baker was justified in the reasonable and prudent anticipation that a valuable mine could be developed on this deposit, and in proceeding with the expenditure of his labor and means to that end, he located claims for far more land and mineral than reason and prudence would allow." United States v. Baker, supra at 335. This statement was the Board's expression and application of the time-honored "prudent man rule," first articulated in Castle v. Womble, 19 L.D. 455 (1894), which has since been repeatedly approved by the Supreme Court. Andrus v. Charlestone Stone Products Co., Inc., supra at 607 n.4; United States v. Coleman, 390 U.S. 599 (1968); Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336 (1963); Cameron v. United States, 252 U.S. 450, 460 (1920); Chrisman v. Miller, 197 U.S. 313, 322 (1905). Statute provides that "valuable" mineral deposits are open to exploration and purchase. 30 U.S.C. § 22 (1976). Whether a deposit has economic value is determined by whether there exists a profitable market which will receive the material, as "[m]inerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable." United States v. Coleman, supra at 602. Moreover, this test of whether claims are supported by a qualifying discovery of an economically valuable deposit of mineral must be applied to each claim individually. United States v. Melluzzo (Supp. On Judicial Remand), 32 IBLA 46 (1977), aff'd, Melluzzo v. Andrus, No. CIV-79-282-PHX CAM (D. Ariz. May 20,

1980), and cases cited. An assumption that a qualifying discovery on one claim can inure to the benefit of another is a mistake of law. Henrikson v. Udall, 229 F. Supp. 510, 512 (N.D. Calif. 1964), aff'd, 350 F.2d 949 (9th Cir. 1965), cert. denied, 384 U.S. 940 (1966). Where multiple claimants have located multiple claims for an infinite amount of mineral which is widespread and abundant for which there is only a limited market demand, the Court of Appeals for the Ninth Circuit has held that claims which are not already developed and producing profitably to supply that market must be held invalid where it cannot be proven that they are presently capable of such profitable participation. Melluzzo v. Morton, 534 F.2d 860 (9th Cir. 1976). Of course, where, for example, 50 different claimants locate 50 separate claims for a superabundance of the same mineral with a limited market, the question of "excess reserves" does not arise. Each claim is regarded individually and a determination made that the mineral deposit is or is not "valuable" according to the test applied by the Supreme Court in United States v. Coleman, supra, and interpreted by the Ninth Circuit in Melluzzo v. Morton, supra. Those claims determined to be not qualified according to these criteria are properly held to be invalid for want of discovery of a valuable deposit of mineral.

Where a single claimant or association of claimants locates multiple claims for far more mineral than the market can absorb the test of the validity of each claim is precisely the same. No "legislative enactment by an executive tribunal," violative of "our system of separation of powers" is required in order for the Department to

discharge its historic responsibility in this regard. ^{10/} The only distinction between the situation involving multiple parties locating multiple claims involving a superabundant mineral with a limited market, and the situation where a single locator or association does so, is in the terminology employed to describe what has happened. Assuming that the single locator does have, at present, a profitable market for a limited amount of material which can easily be supplied from one claim, the question of the value of the deposits of the same mineral on the rest of the claims necessarily arises. Usually, the claimant asserts that the additional claims are needed as a reserve supply in order to continue his operation when the supply on the first claim is exhausted or severely depleted. This Board has recognized repeatedly the right of a mining claimant to locate claims containing valuable deposits of mineral and to hold them, without development, as "reasonable reserves." See, e.g., United States v. Bunkowski, 5 IBLA 102, 79 I.D. 43 (1972); United States v. Harenberg, 9 IBLA 77, 80 (1973). ^{11/} In United States v. Gibbs, 13 IBLA 382, 396 (1973), we discussed the concept of "reasonable reserves" and application of a test of the validity of a claim allegedly located for that purpose, as follows:

The Judge further found that the absence of sales was attributable to the fact that the operator chose to put his

^{10/} The role and authority of the Department in the determination of the validity of mining claims is discussed, infra.

^{11/} This case, United States v. Harenberg, supra, is not the same one referred to by the Ninth Circuit in the Baker decision, which found a later decision, United States v. Harenberg, 11 IBLA 153 (1973), to be unhelpful on the issue of locating claims for reserve supplies. The second Harenberg decision alluded to the discussion of "reserves" contained in the first Harenberg decision.

plant on the adjacent claim and hold the material from the contested claim in reserve. He concluded that the holding of a claim without development as a reasonable reserve supply is a permissible procedure under the rules announced in the case of United States v. Anderson, 74 I.D. 292, 303 (1967), noting that the reserves afforded by the Sorefoot No. 10 were clearly not in excess of the 30-year supply held to be a reasonable amount in the Anderson case. Again, we agree.

The question of the propriety of holding mining claims as reserve sources of supply has been considered in other cases. It is well established that the holding of a mining claim as a reserve of sand and gravel for future development without present marketability does not impart validity to the claim. United States v. O'Callaghan, 8 IBLA 324 (1972); United States v. Stewart, (1972), *supra*; United States v. McCall, 1 IBLA 115 (1970); United States v. Hinde, A-30634 (July 9, 1968); United States v. Schelden, A-29078 (April 26, 1963); United States v. Fischer Contracting Co., A-28779 (August 21, 1962). But where the marketability of the deposit has been established for the critical dates by a demonstration that the claimant could then have mined and sold the material at a profit, his election to retain that deposit intact as a reasonable reserve for future use will not operate to invalidate an otherwise valid claim. United States v. Harenberg, *supra*. The location of claims for the purpose of securing reasonable reserve supplies is not prohibited by the United States mining laws, but claims so located must meet the same standards and pass the same tests of validity as other claims, including [where the mineral is a "common variety"] a showing of marketability on or before July 23, 1955. United States v. Stewart, (1972) *supra*, at p. 56. [Emphasis in original.]

But where a claimant has located multiple claims embracing deposits of mineral so vast that the limited market for that mineral, reasonably projected for growth, could not be expected to absorb it over the course of hundreds or even thousands of years, we have held that such an appropriation of public land cannot be justified under the mining laws as necessary "reasonable reserves." Instead we have characterized such locations as "excess reserves," a term which the Ninth Circuit has disdained in favor of its own descriptive phrase "the

too much test" (always italicized by the Court). The reserves are in excess of the ability of the market to absorb them and, correspondingly, in excess of the claimant's need of them for any legitimate purpose under the mining law. The claims located for such additional amounts are invalid for lack of a discovery of a valuable mineral deposit on each of them, since no prudent man would spend his labor and means in an effort to produce mineral in such quantity that the market could not accept even a small percentage of it.

Theoretically, mineral from all the claims blanketing an homogenous, massive, and extensive deposit could be marketed profitably to supply a limited demand by the simple expedient of taking a little material from each claim as the opportunities for sales presented themselves. But this would be deliberately inefficient mining, not bona fide development but a clear subterfuge to control the land, either to preclude its acquisition by competitors, or for other purposes. United States v. Osborne (Supp. on Judicial Remand), 28 IBLA 13, 29 (1976). "Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes." United States v. Coleman, supra at 602. Moreover, the Court of Appeals for the Ninth Circuit, prior to its decision in Baker, had considered and rejected the notion that simply because a limited market exists for a mineral which is the subject of a great many claims, we must consider that each claim, viewed in isolation from all the rest, is capable of being developed as a profitable source of supply for that market. In Melluzzo v. Morton, supra at 864 n.4, the Court said:

A hypothetical market in which the claimant's material is the only unmarketed material taken into account is hardly a useful supposition. If claimant's material can be marketed, then so can that from all potentially competitive sources. To exclude all unmarketed material save that of the claimant could result in the unrealistic conclusion that all such material, considered claim by claim, is marketable at a profit notwithstanding the fact that if the claims had all been actively operated none could have done so profitably. [Emphasis added.]

The same theory (that since a limited market existed locally in an area of superabundant supply, material could be taken from any claim and sold at a profit into that market) was addressed in Osborne v. Hammitt, 377 F. Supp. 977, 985 (D. Nev. 1964), where the Court said:

We think the Secretary was right in holding the proofs insufficient here to establish present marketability under the quoted standards. If we were to judge the case solely on the basis of the conflicting evidence bearing upon the theoretical marketability of the sand and gravel from the Bradford Claims, we would be inclined to agree with the Hearings Officer rather than the Secretary * * *. But the record discloses a situation where, if the Bradford Claims could be sustained on the hypothetical and speculative opinion evidence relied upon by the plaintiffs, each of the claims in the valley comprising over 100,000 acres * * * of public lands would have been patented as valuable for mining, where it is evident and shown by the record that not more than one percent of the material might have been marketable in the reasonably foreseeable future.

In Melluzzo v. Morton, supra (as in Osborne v. Hammitt, supra), the Court was dealing with a superabundant supply from many sources held by diverse owners and claimants, and the Court was in full agreement with the Department that claims for surplus mineral which simply overwhelm the available market are invalid for want of discovery. The same factors were operative in the Baker case, but it was unnecessary

to deal with them at length because Baker's own claims constituted such a surplusage on the basis of his own experience after 18 years of operation. Thus, in Baker, it was unnecessary to develop evidence concerning the total available supply from all the sources in the area in order to ascertain whether Baker had located far more than his market could absorb or whether he had merely provided himself with "reasonable reserves." In making this determination, the Board could not even consider increases in the market since July 23, 1955, as the cinders on Baker's claims were a common variety. Therefore, the validity of each claim had to be tested on the basis of whether the deposits on each claim were marketable at a profit as of that date. Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971).

Nevertheless, although Baker's principal workings and improvements were on his Wildcat Hill Nos. 2 and 3 claims, where he had a sufficient supply of cinders for 100 to 200 years, the Court of Appeals noted that, "Baker had, in fact, developed and marketed the cinders from claims one and four," and that "he had actually extracted and marketed cinders from the contested claims at a profit." Baker v. United States, supra at 228.

The Court of Appeals for the Ninth Circuit has previously considered a classic case wherein a claimant acquired multiple claims for common, abundant mineral, some of which could be then profitably disposed in the market while the balance could not be, because the claimant's own production from one of its claims was sufficient to satisfy the existing market. In that case, Clear Gravel Enterprises, Inc. v.

Keil, 505 F.2d 180 (9th Cir. 1974), cert. denied, 421 U.S. 930 (1975), the Court noted that appellant had held 16 association placer claims of 160 acres each located for common sand and gravel in the Las Vegas Valley, and had leased all 16 claims to the second largest producer of sand and gravel in the area. The lessee company had opened a mine on only one of these claims. The validity of 14 of the claims had previously been litigated, as the result of which 7 were ordered to patent and 7 claims were declared invalid. 12/ Before the Court was the question of the validity of the remaining two claims, neither of which was the claim being mined by the lessee. The Court noted and held as follows:

Other evidence produced at the time of the hearing before the Hearings Examiner further demonstrated that the one mine being operated provided sufficient sand and gravel to meet the needs of the market and that it could yield a sufficient quantity of sand and gravel to provide for any increased share of the market to its producer.

* * * * *

Of particular significance is the obvious fact appearing from the record that the quantity of Appellant's other sand and gravel holdings in the area, when combined with the state of the market, were such as to deter the Appellant from expending money and effort to extract and market the sand and gravel from the claims in question from the time of location in 1946 until approximately 1963. [Emphasis added.]

12/ Palmer v. Dredge Corp., 398 F.2d 791 (9th Cir. 1968), cert. denied, 39 U.S. 1066 (1969). This case presents the first discussion by the Ninth Circuit of the application of the marketability test to determine whether a deposit is "valuable" following the Supreme Court's decision in United States v. Coleman, supra. There it is also reported that the Dredge Corporation actually held 36 sand and gravel claims in the area at the time the various proceedings were initiated.

Id. at 505 F.2d 181. Although the Court did not use the terms "too much" or "excess reserves," either phrase would have served to characterize its findings. The Court had, from the outset, identified the issue in the case as being whether there had been a discovery of valuable mineral deposits on the claims within the definition of "the prudent man rule" as tested by an ability to market the material at a profit during the critical period. Upon finding "that the quantity of Appellant's other * * * holdings * * * were such as to deter the Appellant" (emphasis added) from attempting to mine the subject claims, they were held to be invalid. However, as the material on all the claims was homogenous, it must be presumed that profitable sales of material from each of the claims could have been made to some limited extent, just as was done in the Baker case. Nevertheless, in deciding Baker, the Court said, "However, Clear Gravel cannot be read as establishing or even supporting a too much test." Baker v. United States, supra at 227.

In Hallenbeck v. Kleppe, 590 F.2d 852, 859 (10th Cir. 1979), the Court of Appeals quoted with approval from the decision of the district court in that case saying:

We feel the court correctly followed the test of present marketability. See, e.g., Coleman, supra, 390 U.S. at 602-03, 88 S.Ct. 1327; Barrows v. Hickel, 447 F.2d 80, 83 (9th Cir.). The court's findings in the instant case stated that: "A private litigant cannot locate claims upon public lands and then simply wait until the minerals are in sufficient demand to be marketed at a profit," and also that: ". . . plaintiffs cannot hoard common sand and gravel on public lands until it becomes profitable to market such deposits." The court also quoted the following statement from the opinion in Foster v. Seaton, 106 U.S. App. D.C. 253, 255, 271 F.2d 836, 838:

To allow such land to be removed from the public domain because unforeseeable developments might some day make the deposit commercially feasible can hardly implement the congressional purpose in encouraging mineral development.

In reversing the Board's decision in the Baker case insofar as it held that two claims were invalid by reason of being located "for far more land and mineral than reason and prudence would allow" (the "prudent man test"), the Court of Appeals asked a number of rhetorical questions. In view of the fact that we are remanding the instant case for rehearing, we will supply responses to some of the Court's rhetorical questions for the edification and guidance of the parties and the Administrative Law Judge who will hear and decide the contest on remand.

Stating that, "Under the [too much] rule, Interior reserves to itself the decision as to how slowly or rapidly a claim can be worked," the Court asked, "Will the large well-endowed corporation * * * with extensive and valuable open-pit or subsurface claims, be subject to the same standards as the sole 'pack-string' prospector?" Baker v. United States, *supra* at 229.

The Department has never indicated, even by implication, that it reserves to itself the decision as to how slowly or rapidly a claim can be worked. Moreover, this Board has held repeatedly that the test of whether there has been a discovery of a valuable mineral deposit on any claim is an objective test, not a subjective one, and that the financial abilities of the claimants are irrelevant to this inquiry. See, e.g., United States v. Reynders, 26 IBLA 131, 136 (1976), wherein we

said, "The prudent man test is objective, and subjective considerations, such as willingness to work for little or no return, simply have no place in the calculus of prudence." (Citations omitted.) The inquiry is limited to whether the mineral on the claim can be extracted, beneficiated, transported, and disposed in the market at a profit to the claimant which is sufficiently attractive to warrant a person of ordinary prudence, not necessarily a skilled miner, to expend his labor and means, with a reasonable prospect of success, in developing a paying mine. Castle v. Womble, *supra*. Unpatented mining claims are property in the fullest sense, and may be sold, leased, transferred, mortgaged, inherited, sold on execution, or acquired by condemnation. Accordingly, the relative size or wealth of a particular claimant is not, and never has been, a factor in the Department's consideration of the validity of a claim. Only the claim itself is at issue, and that is the reason that a Government contest of a mining claim has historically been regarded as an action quasi in rem, rather than in personum.

The Court of Appeals in the Baker decision asks, "To what locality or geographic region will [the too much test] apply? To what classification of mineral deposits will it apply? To what geologic structures will it apply?" Baker v. United States, *supra* at 229. The answer, of course, is that it applies to multiple locations of claims to land containing vast amounts of minerals of a type which can be marketed at a profit only in limited quantities from a few claims. For example, in United States v. Duval, 1 IBLA 103 (1970), the claimants had located 24 association placer claims on 3,080 acres in what became the Oregon Dunes Recreation Area. The claims were located for silica

quartz sand suitable for glass making. Not only was the market so limited that no sand from these claims had been sold, the evidence established "that other sands found in numerous deposits along the Oregon coastal regions and in the entire Pacific Northwest might also be used in glass making with varying needs for beneficiation, sizing and screening and these deposits are in the millions, if not billions, of tons." Id. at 107. Our decision holding these claims invalid was affirmed in Duval v. Morton, 347 F. Supp. 501 (D. Ore. 1972), which was affirmed in turn by the Ninth Circuit's memorandum opinion of December 19, 1973, No. 72-2839.

In Ideal Basic Industries, Inc. v. Morton, 542 F.2d 1364 (9th Cir. 1976), appellant had located and applied for patent 45 claims in a national forest in Alaska. These claims were located for limestone which the claimant could presently use in its own plants in the manufacture and sale of cement at a profit. Nevertheless, because that limestone could only be utilized at a cost of \$1.94 per ton at plants where ample supplies of limestone from other sources were available at \$1.48 per ton, the Court perceived that even though the company could still make a profit through the sale of cement made from the stone from the subject claims, it could only do so "by sacrificing profits properly attributable to manufacturing or selling." Id. at 1369-70. The Court affirmed the authority of this Department to pursue its inquiry through hearing procedures to determine whether the company would be prudent to sacrifice profits which could be made by utilizing the limestone which was available at significantly lower cost, and whether the

limestone on the claims was truly presently marketable at a profit under these circumstances. (Trask, J., dissenting).

In Multiple Use, Inc. v. Morton, 504 F.2d 448, 450 (9th Cir. 1974), the Court noted that, "There was no evidence that the sand and gravel were used in quantity prior to July 23, 1955, hence they are not locatable deposits. The stone and similar deposits are along the creek bed for miles and appear as common as drops of water in San Francisco Bay." (Emphasis by the Court.)

In Dredge Corporation v. Penny, 362 F.2d 889 (9th Cir. 1966), the Court encountered a situation where the plaintiff had located sand and gravel claims covering 16 quarter-sections of land (2,560 acres) in the Las Vegas Valley, Nevada. (The case was decided on the basis of the status of the land rather than on the discovery issue.) Another example of superabundant supplies of sand and gravel situated on numerous claims in the Las Vegas Valley was Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959), where the Court noted:

With respect to widespread non-metallic minerals such as sand and gravel, however, the Department has stressed the additional requirement of present marketability in order to prevent the misappropriation of lands containing these materials by persons seeking to acquire such lands for purposes other than mining. Thus, such a "mineral locator or applicant, to justify his possession, must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit." Layman v. Ellis, 54 I.D. 294, 296 (1933), emphasis supplied. See also Estate of Victor E. Hanny, 63 I.D. 369, 370-72 (1956). Particularly in view of the circumstances of this case, we find no basis for disturbing the Secretary's ruling. The

Government's expert witness testified that Las Vegas valley is almost entirely composed of sand and gravel of similar grade and quality. To allow such land to be removed from the public domain because unforeseeable developments might some day make the deposit commercially feasible can hardly implement the congressional purpose in encouraging mineral development. [Emphasis by the Court.]

Thus, the Department's concern for the location of claims for excess reserves is geologically limited to those types of minerals which occur in such abundance that only a small portion of the known deposits can be absorbed by the market at a profit. Minerals for which there is virtually unlimited demand, such as precious metals, and which can be extracted and sold at a profit, of course would not be the subject of such concern. The distinction between the two categories was noted by the Supreme Court in United States v. Coleman, supra. With respect to the other questions raised by the Court in Baker, the only concern of the Department for locality or geographic region in the context of excess reserves would relate to local or geographic influences on the marketability of the mineral, e.g., market areas, hauling distances and costs, etc. We can think of no way in which the nature of a particular geologic structure might influence the concept of excess reserves.

In Baker, supra at 229, the Court of Appeals also asked:

Will claimants of all variety now be forced to locate and claim only mediocre discoveries, exploitable within 1, 5 or 10 years? Will claimants be forced to overlook those claims with extremely rich and extensive deposits which may require many more years to develop and exploit, but which are by all present day statutes and relevant decisions legally exploitable claims?

As explained above, claims "which are by all present day statutes and relevant decisions legally exploitable" would never be considered excess reserves by this Department. And, as also related above, reasonable reserves, liberally projected for many years into the future, have been consistently approved by this Department as legitimately within the scope and purpose of the general mining law. United States v. Anderson, supra; United States v. Harenberg, supra; United States v. Gibbs, supra; United States v. Baker, supra. See also United States v. McElwaine, 26 IBLA 20 (1976). What amount of reserves is "reasonable" is a determination to be decided on the basis of the evidence in each case. The nature of the mineral, its unit value, the extent of the market, and whether it is expanding or diminishing, the amount of similar mineral which can supply that market from other sources (Melluzzo v. Morton, supra), might all bear on the question of whether the location of additional claims for the same mineral was justified as the act of a prudent man in the reasonable belief that by the expenditure of his labor and means a valuable mine might be developed on each such claim.

The Court of Appeals in the Baker case stated at 229:

The too much rule is, in our view, a wholly unreliable subjective analysis, resting too much in the eye of the administrative beholder.

The IBLA exceeded its discretionary and statutory powers when it adopted its too much or excess reserves rule. Although Congress may see fit to deal with the issue, it has never done so. The IBLA decision amounts to a legislative enactment by an executive tribunal. The IBLA possesses no such authority under our system of separation of powers.

As hereinbefore indicated, a reference to "excess reserves" does not describe a new rule of law invented by this Department, or a super imposition of a new test of a claim's validity on the existing law. It is nothing more or less than a descriptive phrase applicable to a particular set of circumstances. It describes the location of claims for far more land and mineral than reason and prudence would allow because there is such a superabundance of the material that the market simply cannot accept all of it at a profit. Therefore, some of the deposits must be regarded as not valuable in an economic sense. This concern for excess reserves is rooted in the basic statute, 30 U.S.C. § 22 (1976), and controlled by the "prudent man" test of discovery as complemented by the requirement that the economic value of the deposit be measured by a determination of whether it is presently marketable at a profit. United States v. Coleman, supra. In the making of this determination, it is appropriate to consider the quantity of the claimant's other holdings of this same mineral, and the limitations of the market, and the claimant's share of that market. Clear Gravel Enterprises v. Keil, supra. It is also appropriate to consider the magnitude and sources of other supplies of that mineral to the same market. Melluzzo v. Morton, supra.

The authority of the Department of the Interior to make such determinations has been reiterated frequently. See, e.g., Ideal Basic Industries v. Morton, supra at 1367.

The Supreme Court of the United States has repeatedly acknowledged and defined the judicial role of the Secretary.

Congress has placed the Land Department under the supervision and control of the Secretary of the Interior, a special tribunal with large administrative and quasi-judicial functions, to be exerted for the purpose of the execution of the laws regulating the disposal of the public lands. [Emphasis in original.]

Plested v. Abbey, 228 U.S. 42, 52 (1913). Accord, United States ex rel. Ness v. Fisher, 223 U.S. 683, 693 (1912); United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U.S. 316, 324 (1903).

[T]he Secretary of the Interior is the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States. *
* * "The statutes in placing the whole business of the Department under the supervision of the Secretary, invest him with authority to review, reverse, amend, annul or affirm all proceedings in the Department * * * by direct orders or by review on appeals."

Knight v. United States Land Association, 142 U.S. 161, 178 (1891). Accord, Cameron v. United States, 252 U.S. 450 (1920); United States v. Fisher, supra; Stoneroad v. Stoneroad, 158 U.S. 240 (1895); Orchard v. Alexander, 157 U.S. 372 (1895); McDaid v. Oklahoma Territory, 150 U.S. 209 (1893); Hastings & Dakota R.R. Co. v. Whitney, 132 U.S. 357 (1889).

The determination of the validity of claims against the public lands was entrusted to the General Land-Office in 1812 (2 Stat. 716) and transferred to the Department of the Interior on its creation in 1849. 9 Stat. 395. Since that time, the Department has been granted plenary authority over the administration of public lands, including mineral lands; and it has been given broad authority to issue regulations concerning them. Cameron v. United States, supra -- an opinion written by Mr. Justice Van Devanter, who, as Assistant Attorney General for the Interior Department from 1897 to 1903, did more than any other person to give character and

distinction to the administration of the public lands -- illustrates the special role of the Department of the Interior in that field. [Footnotes omitted.]

Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336-37 (1963).

By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the land department, as a special tribunal; and the Secretary of the Interior, as the head of the department, is charged with seeing that this authority is rightly exercised 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, 459-60 (1920).

The Interior Board of Land Appeals "is an authorized representative of the Secretary for the purpose of hearing, considering and determining, as fully and finally as might the Secretary, matters within the jurisdiction of the Department involving hearings, and appeals and other review functions of the Secretary." 43 CFR 4.1. If, as was said by the Court of Appeals in the Baker case, "Interior Board of Land Appeals' `too much rule,' prohibiting the mining claimant from locating claims in excess of reasonably anticipated market need, was abuse of discretion [13/] contrary to existing mining law" (Syllabus), then there is no entity within the Federal establishment with the

^{13/} Since the Baker case involved a claim to property, the contest and administrative appeal were conducted pursuant to the Administrative Procedure Act. Such cases are not resolved by the discretionary powers of the Secretary, which do not arise. As there was no discretion exercised by the Board in making its decision, it is difficult to understand the Court's holding that the decision constituted an abuse of discretion.

requisite jurisdiction, authority, and responsibility to challenge and determine the validity of "extra" claims containing deposits of mineral which are without value because of the limitations of the market and superabundant existing supply. Land located for such claims would pass from Federal ownership by default simply because of an absence of any governmental authority to administer the law. We cannot believe that was the intended consequence of the holding in Baker, although the dissenting Justices of the United States Supreme Court perceived that it might have that effect.

The Department of the Interior recommended to the Department of Justice that application be made to the Supreme Court for a writ of certiorari in the Baker case. The Solicitor General concurring, this was done, but the Supreme Court denied the petition on October 20, 1980. Andrus v. Baker, 101 S. Ct. 332 (1980). Mr. Justice Blackmun authored a dissenting opinion, in which he was joined by Mr. Justice Marshall and Mr. Justice Powell. The dissent noted that this Board had nullified two of Baker's four contested Wildcat Hill claims, "reasoning that development of all four claims would be imprudent." The opinion also noted that proceedings against a fifth Wildcat Hill claim had been dismissed. Mr. Justice Blackmun related the Board's action to the "prudent person" test and its correlative marketability standard, and opined at 333:

I believe that, as in Coleman, the Court of Appeals may have unduly restrained the Secretary's authority to evaluate claims of mineral discoveries on public lands; its ruling appears to be based on the perception, possibly a misperception, that the Secretary's "excess reserves"

analysis does violence to the statute. In light of that ruling, one now may expect the assertion of additional claims involving "valuable" mineral deposits not marketable in the foreseeable future.

"It is still proper here that the Secretary `take into account the economics of the situation."

Roberts v. Morton, 549 F.2d 158, 163 (10th Cir. 1976), quoting from Converse v. Udall, 399 F.2d 616, 622 (9th Cir. 1968). Roberts v. Morton, *supra*, affirmed a decision of this Board styled United States v. Zweifel, 11 IBLA 53, 80 I.D. 323 (1973), in which one man located 2,910 association placer mining claims for himself and as agent for 250 colocators, filing the majority of said claims within a span of 10 months.

The McCall v. Andrus Decision

The decision in Baker v. United States, *supra*, was handed down by the Court of Appeals for the Ninth Circuit on February 11, 1980. On July 10, 1980, that Court issued its decision in McCall v. Andrus, 628 F.2d 1185, *cert. denied*, 49 USLW 3710 (Mar. 23, 1981); as related in the syllabus, in part:

The Court of Appeals, Farris, Circuit Judge, held that: (1) [Board of Land Appeals] in concluding that claimant would have a reserved supply of sand and gravel for 100 years and that, without expanded market, it was not economically feasible to produce material on contested tracts was proper application of test for determining whether land was mineral in character; (2) testimony of government expert that he had examined claims and that contested areas were not mineral in character because materials from them could not have been mined and marketed for profit at time of his examination or at any time earlier constituted substantial evidence of prima

facie case by government that lands were not mineral in character, and testimony of one of claimant's experts that sand and gravel on contested area could have been marketed at profit but that he had not made market study was not enough to undermine substantiality of government's case; * * *. [Emphasis added.]

William A. McCall, Sr., and another had acquired 26 association placer mining claims of 80 acres each, located for deposits of sand and gravel in the Las Vegas Valley. The 2,080 acres comprising the claims adjoined the boundaries of the city of Las Vegas and lay approximately 6 miles westerly from the Clark County Courthouse in the center of the city. Some of the claims and/or portions of claims had been developed and material therefrom was being extracted and sold at a profit. The claimants had applied for patent to all the claims. Two patents had been granted in response, one for 40 acres and one for 190 acres, covering parts of five claims. Contest proceedings were initiated, the complaint charging that the remaining portions of these five claims, amounting to 170 acres, were not mineral in character.

At the hearing the evidence, including that presented by the Government, established that on each 10-acre subdivision of the contested portions of the several claims there existed sand and gravel which was inferentially of the same character as the material under the patented portions of these same claims and under other patented claims adjacent. However, most of the contested areas were overlain by a dense, cemented caliche-type conglomerate which would make extraction of the commercial sand and gravel beneath more difficult and expensive than on the patented claims adjacent. Moreover, the evidence showed that this mineral material in easily recoverable form exists over many

square miles of the Las Vegas Valley, and that there were numerous sand and gravel operators in the area at the time of the hearing and that there had been many active operators there for the preceding 30 years, with operations being conducted on widely dispersed tracts, including the patented portions of the five claims involved in the contest proceeding. In addition the hearing examiner noted that the contestees had already received patents for 230 acres containing over 3,500,000 yards of sand and gravel which, "If they had a market for this amount they would have a reserve supply for one hundred years." On the basis of these facts the examiner held that the contested portions of the claims were "nonmineral in character" and void, notwithstanding that there existed on each of the contested portions mineral of the same type and quality as on the patented portions which had been found by the Department to be valid claims.

Underlying this holding was a finding that given the limitations of the market to absorb the material, the vast local abundance of it, and numerous competitive suppliers, coupled with the fact that the Department had already awarded the claimants patents to Federal lands containing 100 years' reserve supply, it would not have been prudent or reasonable to attempt development of the contested deposits at any time prior to July 23, 1955, when common sand and gravel ceased to be locatable, because these deposits were more costly to develop than what was already available in superabundance.

On appeal, this Board reversed the decision of the hearing examiner as to three of the contested 10-acre subdivisions where mining operations were actually conducted, and affirmed his decision that the remaining portions were null and void because they were "nonmineral in character."

United States v. McCall, 7 IBLA 21 (1972).

Suit for judicial review of this Board's decision was dismissed on summary judgment by the United States District Court for the District of Nevada, and the claimants appealed to the Court of Appeals for the Ninth Circuit.

In affirming the Board's decision the Court observed:

[6, 7] McCall's contention that the Board based its decision on the absence of actual mining is incorrect. The Board adopted the conclusions of the hearing examiner who stated:

It is only those tracts with a deposit which can be extracted, processed, and marketed at a profit in competition with other deposits that are valuable and mineral in character. The contestees believe that the caliche material can be blasted and processed at a competitive price at the present time. [The contestees] have received a patent for 230 acres which has over three and one-half million yards of sand and gravel in every ten feet of depth. If they had a market for this amount they would have a reserve supply for one hundred years.

The contestees offered no evidence to suggest that they had a market for any more than this amount of material either in 1948, 1953, or 1955. Without an expanded market it was not economically feasible to produce the material on the contested tracts. Consequently it had no value as a mineral prior to July 23, 1955.

This is a proper application of the test for determining whether land is mineral in character. [Emphasis added.]

McCall v. Andrus, supra at 1188.

Again, in this case the Court did not employ the phrases "too much" or "excess reserves," although it did stress the fact that if appellants had a market for all the material on other lands which they claimed and had been granted title to "they would have a reserve

supply for one hundred years." (Emphasis added.) The Court then said, "McCall presented no contrary evidence to show that a market existed in Las Vegas in 1955 in which he could have sold at a profit more sand and gravel than the amount contained in the already patented areas." Id. at 1189 (emphasis added). Clearly, the Court was of the opinion that the claimants had a market for some of the material, but they were asserting claims to more land and mineral than could be profitably exploited and which, therefore, constituted an additional "reserve supply" on which a prudent man would not be justified in expending his labor and means to develop in the reasonable anticipation of creating a valuable mine. This precisely parallels the rationale of this Board in the Baker case, supra.

However, in McCall, the Court attempted to distinguish Baker, saying at 628 F.2d 1189:

Our recent decision in Baker v. United States, 613 F.2d 224 (9th Cir. 1980), is not controlling here. In Baker, the Board had refused to grant a patent for three entire claims even though it found that a valid discovery had been made on each claim. [14/] [Emphasis added.] The claims were all composed of similar material. The Board invalidated two of the claims because it found that Baker had located claims in excess of the reasonably anticipated market need for the mineral (the "too much" test). We held that there was no statutory support for the Board's action.

14/ The sentence emphasized in the quotation contains two misstatements of fact. First, the Board's decision in Baker held that two claims of the Wildcat Hill Group were invalid, not three claims. Second, the Board's decision did not find "that a valid discovery had been made on each claim." That finding had been made in the decision of the Administrative Law Judge who presided at the hearing, but was expressly reversed by the Board as to the two claims held to be invalid upon appeal to the Board.

Unlike Baker, here the character of the land claimed was contested. The claims which were held invalid here were all covered by caliche material. The hearing examiner noted that it was not economically feasible to extract the type of material on these tracts since there were large deposits of easily removable sand and gravel on the other tracts.

The Court has thus approved a finding by this Board that claims to lands on which there are mineral deposits which exceed the ability of the market to absorb at a profit are invalid because such lands are "nonmineral in character," but rejected a similar finding where such deposits were characterized as "excess reserves."

The "Mineral in Character" Concept

The term "mineral in character," or its antonym, "nonmineral in character" is unfortunately ambiguous as a term of art. It can be used interchangeably to describe either a geologic condition in the land or an economic condition. That is, "nonmineral in character" may describe land which is virtually barren of the mineral which is the subject of an alleged discovery, or it may describe land on which there are vast deposits of the mineral claimed which are of no commercial value because of the superabundant supply available to meet a limited demand. To illustrate this duality of usage of the same term, consider two hypothetical examples.

First, a 160-acre association placer claim is located for gold based upon a discovery of placer gold in an alluvial wash. The gold is present in the wash and may be economically recovered and disposed at a

profit. However, the wash occupies only parts of two 10-acre subdivisions of the 160-acre claim, while the remaining fourteen 10-acre subdivisions which comprise the upland portion of the claim are devoid of any trace of gold. Each such barren, upland 10-acre tract may be invalidated on the basis that it is "nonmineral in character," which clearly it is because the mineral which was discovered and served as the basis for the location of the claim simply does not exist on that portion of the claim.

The second hypothetical example concerns two association placer claims of 80 acres each held by the same claimants and located prior to 1955 on a vast and extensive deposit of common pumice. The total reserves are estimated at not less than ten million tons, and perhaps as much as twenty million tons may be present on the two claims. There are two other operators of competitive sources active in the area. The only buyer is the local paving contractor, who uses the pumice as an additive in concrete to surface roads on jobs within a 40-mile radius. Beyond that distance there are plentiful additional sources which are cheaper for the contractor to use because of hauling costs. Any of the three local competitive producers could easily supply the contractor's entire needs from a single 20-acre pit for the next 50 years, but the contractor divides his purchases between them on the basis of which is closest to the particular job site. Even if the two competitors discontinued operations and the claimants gained the entire market, there is enough pumice on the two claims to supply that limited market for 250 years. The claimants are mining from a single pit on two 10-acre subdivisions of one claim. The remaining portions of the claim being

operated and the additional claim not being operated are properly described as "nonmineral in character," despite the presence of great quantities of pumice on every portion of both claims. This is explained by the Ninth Circuit's decision in McCall v. Andrus, supra, where the Court took notice of the Department's finding that McCall had already been granted patents to public lands containing a reserve supply of mineral ample for 100 years; that he offered no evidence of a market for any more; that without an expanded market it was not economically feasible to produce material from the contested tracts; and that consequently the additional material was without value as mineral. The court then said:

This is a proper application of the test for determining whether land is mineral in character. The test is whether

the known conditions at the time of [the patent] proceedings were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end.

Diamond Coal and Coke Co. v. United States, 233 U.S. 236, 239-40, 34 S.Ct. 507, 509, 58 L.Ed. 936 (1914) (concerning whether land claimed as a homestead was mineral land not subject to homestead claims). See also, United States v. Southern Pacific Co., 251 U.S. 1, 40 S.Ct. 47, 64 L.Ed. 97 (1919); Standard Oil Co. of California v. United States, 107 F.2d 402 (9th Cir.), cert. denied, 309 U.S. 654, 60 S.Ct. 469, 84 L.Ed. 1003 (1940); United States v. Bunkowski, supra at 55. [15/]

Id. at 1188.

^{15/} It is perhaps noteworthy that the Board's decision in United States v. Bunkowski, supra, 79 I.D. 43 (1972), was criticized by the Ninth Circuit in its Baker opinion as it "shares the same faulty premise" as the Board's Baker decision. However, in the McCall v. Andrus decision issued 6 months later, the Ninth Circuit cites Bunkowski twice with approval.

Seven days before the Ninth Circuit issued its decision in United States v. Baker, *supra*, this Board published its decision styled United States v. Williamson, 45 IBLA 264, 87 I.D. 34 (1980), in which we discussed the interrelationship of the terms "mineral in character" and "excess reserves," as follows:

[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. [Emphasis in original.]

Id. at 293-94, 87 I.D. at 50.

Thus, because in the McCall case we were applying the "10-acre rule" to portions of claims which had been treated as valid otherwise, we regarded the lands containing the additional, unmarketable, valueless sand and gravel as "nonmineral in character," because the 10-acre

rule provides for the elimination of aliquot 10-acre portions of lands which are "nonmineral in character" from otherwise valid placer claims. But in the Baker case we were eliminating two entire claims for the reason that the cinder deposits were unmarketable and valueless because the three other claims in that group contained more material than Baker's market could absorb over the next 200 years. Therefore, we characterized the deposits as "excess reserves." We might just as easily have said that the lands were "nonmineral in character."

Both terms relate to the absence of a "valuable" deposit of mineral. In both Baker and McCall the claimants had applied for patents, and patents had been approved covering vast amounts of materials on some of the lands applied for. However, as declared in Barton v. Morton, 498 F.2d 288, 292 (9th Cir.), cert. denied, 419 U.S. 1021 (1974):

But there are other considerations. A patent passes ownership of public lands into private hands. So irrevocable a diminution of the public domain should be attended by substantial assurance that there will be a compensating public gain in the form of an increased supply of available mineral resources. The requirement that actual discovery of a valuable mineral deposit be demonstrated gives weight to this consideration.

In sum, the terms "mineral in character" and "nonmineral in character" refer to the land which is the subject of the claim, while the terms "excess reserves" and "reasonable reserves" refer, in certain circumstances, to the deposit of mineral which serves as the object of the claim. All of these expressions relate to whether or not there has

been a qualifying discovery of a valuable deposit of mineral on that particular claim or portion thereof.

Instructions on Remand

Oneida Perlite Corporation, which did not appeal the decision of the Administrative Law Judge, was requested to file a brief analyzing the effect of the decision of the Ninth Circuit in Baker v. United States, supra, on the instant appeal. It responded by asserting that the Administrative Law Judge committed reversible error in determining that the principal issue was "excess reserves" and in finding certain claims were invalid by reason of being located for "excess reserves." Oneida now contends that it is entitled to be issued a patent to the entire 1,960 acres, and requests "a rehearing by an Administrative Law Judge freed from the inhibiting shackles of excess reserves." Oneida says further:

It is also respectfully submitted that, because of the confusion of both fact and law out of which the decision to patent only 580 acres was concluded, this Board cannot render a decision without becoming a long distance trier of facts or substituting its collective guess for the apparent guess of the Administrative Law Judge. This case should consequently be remanded for a de novo hearing pursuant to the altered state of the law.

Counsel for the Forest Service, the appellant before this Board, argues that because Oneida filed no appeal from the decision of Judge Morehouse, that decision "became final as to any disallowances made by him, and properly so, based upon the state of the law as it then existed."

In other circumstances we would agree with appellant. However, in this instance we are disposed to remand for rehearing for two distinct reasons. First, some of the issues raised by appellant cannot be decided by this Board on the basis of the record before it, and more evidence must be adduced on these issues. Second, in light of the pronouncements by the Court of Appeals for the Ninth Circuit in Baker v. United States, supra, and McCall v. Andrus, supra, this Department should strive to conform any final administrative determination to the prevailing law of that circuit. Accordingly, the case will be remanded for rehearing.

As we have heretofore explained at length, the term "excess reserves" is not a rule of law invented by the Department, nor does it represent a superimposition on existing law of some new test of the validity of a mining claim. It is merely a descriptive phrase used in certain circumstances to characterize deposits which are not "valuable" within the meaning of 30 U.S.C. § 22 (1976) because the claimant already possesses an ample supply of such mineral to satisfy his share of a limited market for years into the future, and the additional deposits so described are consequently of no economic value because they cannot be presently marketed at a profit. Thus, claims located for deposits of such economically worthless minerals are invalid because they are not supported by a "discovery" of a "valuable" deposit of mineral within the boundaries of each claim. Therefore, on rehearing charge b. of the contest complaint (referring to excessive reserves) will be dismissed because it is redundant of charge a. of the complaint (referring to the absence of discovery).

It being understood that the term "excess reserves" is merely a descriptive phrase, there is no need that it be stricken from the lexicon of terms employed in the administration of the mining law, and references thereto shall not be deemed to have prejudicial effect.

Charge c. of the contest complaint (referring to the nonmineral character of the land), which was dismissed by Judge Morehouse, will be reinstated on rehearing in view of the holding in McCall v. Andrus, *supra*.

On remand evidence will be adduced and specific findings will be made by the Administrative Law Judge on the following issues:

1. The extent of the present market for perlite which can be satisfied by material from these claims, or any of them.
2. The extent to which deposits of perlite on these claims cannot presently be marketed at a profit, if any.
3. What types of perlite exist on these claims which at present can be marketed at a profit.
4. What types of perlite exist on these claims which cannot presently be marketed at a profit.
5. Whether each type of perlite presently marketable at a profit from these claims has value peculiar to that particular type, or whether

some other type would be equally satisfactory to the purchaser. This inquiry focuses on whether it would be prudent to develop separately and produce from several deposits of distinctive types of perlite to meet a market demand which could not be satisfied from the production of other types.

6. Whether the pumicious perlite found on the Wright Creek No. 2 claim is a locatable mineral, or a common variety of pumice or pumicite which is not subject to appropriation under the mining laws pursuant to 30 U.S.C. § 611 (1976).

7. Whether the thick rhyolite cap which allegedly covers portions of the area claimed is analogous to the cemented caliche cap described in McCall v. Andrus, supra at 628 F.2d 1188, and has a similar effect on the costs or projected costs of extracting, removing, and marketing the mineral from those areas.

8. Whether the area of the Wright Creek No. 3 claim which embraces the improved spring and which was ordered to patent by Judge Morehouse is nonmineral in character as determined by each aliquot 10-acre subdivision concerned, bearing in mind that water is not a locatable mineral. Andrus v. Charlestone Stone Products Co., Inc., supra.

9. Whether the land which is the situs of the mill can be patented as land which is mineral in character and embraced within the boundary of a valid mining claim, or whether it must be relocated as a millsite

claim or claims with appropriate configuration pursuant to 30 U.S.C. § 42 (1976), understanding that millsites may be located only on nonmineral land. The object of this inquiry is not to deprive Oneida of the land on which its mill is situated, but to ensure that any grant contemplated is in conformity with applicable law, so that no further proceedings are necessitated.

10. Whether each claim individually is supported by a qualifying discovery of a valuable deposit of mineral, taking into account the limitations of the market, if any, and the other sources of supply available to that market, including, but not limited to, supplies available from the other claims in the same group. Melluzzo v. Morton, *supra*; Clear Gravel Enterprises, Inc. v. Keil, *supra*.

11. The extent to which specific 10-acre aliquot parts of subdivisions on each claim which is otherwise valid must be eliminated as nonmineral in character, if any.

Hypothetical, theoretical, and speculative opinion evidence of the sort rejected by the Court in Osborne v. Hammitt, *supra* at 985, will not be relied upon as the basis for a finding. *Cf.* United States v. Gibbs, 13 IBLA 382, 389-90 (1973). "Locations based on speculation that there may at some future date be a market for the discovered material cannot be sustained." Barrows v. Hickel, *supra* at 83.

Any stipulated agreement between the Forest Service and Oneida Perlite Corporation as to facts, issues, or disposition of lands

involved will be submitted to the presiding Administrative Law Judge for approval upon his determination that it comports with the facts and law bearing on the matter which is the subject of the stipulated agreement.

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 set aside and the case remanded for rehearing.

Edward W. Stuebing
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Douglas E. Henriques
Administrative Judge

