

JIM D. SCHLOSSER ET AL.

v.

VERLE PIERCE ET AL.

IBLA 85-74

Decided June 6, 1986

Appeal from a decision of Administrative Law Judge Robert W. Mesch, in a private contest action declaring invalid mining claims W MC 211304 through W MC 211358.

Affirmed in part as modified, and reversed in part.

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

A bentonite mining claimant is not required to show each claim he has located is capable of independently supporting a paying mine. Rather, marketability of a known bentonite clay deposit, a low-grade, high-volume clay material, may be demonstrated by showing the feasibility of mining several claims under a single operation where each claim is shown to contain sufficient mineralization to qualify for inclusion within the mined group.

2. Mining Claims: Determination of Validity -- Mining Claims: Mineral Lands -- Mining Claims: Placer Claims

Where the mineral character of land has been contested for lack of bentonite clay of sufficient quality and quantity, the locator of a bentonite placer mining claim must show the mineral character of each 10-acre tract within the claim. 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. Where a preponderance of the evidence at hearing establishes an absence of bentonite from several 10-acre tracts claimed, those parts of the contested claims are properly declared invalid.

3. Mining Claims: Contests -- Mining Claims: Determination of Validity

As a general rule, in a private contest the burden of proof is on the contestant to establish the invalidity of the contested claim or claims by a preponderance of the evidence. Where the contestant fails to do so as to all or parts of 16 of 55 contested bentonite claims, the contest is properly dismissed as to those 16 claims. The remaining claims are properly found to be invalid.

APPEARANCES: Thomas C. Jepperson, Esq., Arthur H. Nielsen, Esq., Jonathan L. Reid, Esq., Salt Lake City, Utah, for contestees; William R. Marsh, Esq., James M. King, Esq., Denver, Colorado, for contestants; Stephen M. Brown, Esq., R. Timothy McCrum, Esq., Department of the Interior, for the Bureau of Land Management, filed an amicus brief.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Verle Pierce and American Colloid Company have appealed from an August 24, 1984, decision of Administrative Law Judge Robert W. Mesch, declaring invalid a group of 55 unpatented bentonite mining claims, W MC 211304 through W MC 211358. <sup>1/</sup> The decision resulted from a private contest brought by Jim C. Schlosser, Katherine Schlosser, and Jimmy D. Schlosser, lessees of

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<sup>1/</sup> The 55 claims are located within secs. 25, 26, and 35, T. 58 N., R. 66 W.; and secs. 3, 4, 9, 16, and 17, T. 57 N., R. 66 W., sixth principal meridian, Wyoming.

public lands under the Taylor Grazing Act, 43 U.S.C. § 315 (1982), and owners of lands patented with mineral reservations which conflict with the contested claims. Judge Mesch invalidated all 55 of the contested claims for failure to support each claim with a valid discovery. Pierce and American Colloid seek review of the decision as to 16 of those claims only.

In January 1974, Pierce and others located 18 bentonite claims of 160 acres each in Crook County in northeastern Wyoming. These claims, known as the "V" claims, were maintained by Pierce through 1980. <sup>2/</sup> In September 1980, Jimmy D. Schlosser and Treva Schlosser staked 40-acre bentonite mining claims, the "ZX" claims, in the same area as the "V" claims. The "V" claims were invalidated in 1981 when affidavits of annual assessment work for 1981 were not filed timely with the Bureau of Land Management (BLM). In April 1981, Pierce located the 20-acre "L" claims at issue here to substitute for the invalidated "V" claims. By agreement dated April 13, 1981, Pierce entered into a lease arrangement with American Colloid for development and mining of the "L" claims. Jimmy D. and Treva Schlosser contested the validity of the "L" claims over their "ZX" claims in the United States District Court. Judgment in favor of the "L" claims was entered on September 9, 1982. See Schlosser v. Pierce, No. C81-0196B (D. Wyo. Sept. 9, 1982).

On March 21, 1983, a private contest complaint against the "L" claims was filed by Jim C. and Katherine Schlosser. <sup>3/</sup> They alleged the claims are \_\_\_\_\_  
<sup>2/</sup> At that time, the lands within the "V" claims were leased under the Taylor Grazing Act or owned by Pierce's father, who transferred the leases and patented lands to the Schlossers in 1978.  
<sup>3/</sup> Jimmy D. Schlosser was later added as a contestant after his appeal to the Ninth Circuit Court of Appeals of the decision in Schlosser v. Pierce, supra, was voluntarily withdrawn on Mar. 18, 1983.

invalid because discovery of a valuable mineral deposit has not been made and the lands within the "L" claims are nonmineral in character (Complaint, Paragraph 14; Amended Complaint, Paragraph 5(b)). A timely answer denying the allegations was filed and an evidentiary hearing was held on April 17, 18, and 19, 1984, before Administrative Law Judge Mesch in Belle Fourche, South Dakota.

The primary issue in controversy at the hearing was whether or not each "L" claim contains a sufficient deposit of marketable F-bed bentonite to constitute discovery. Bentonite is a low-value clay composed primarily of the mineral montmorillonite; it is relatively abundant in the State of Wyoming and is mined by open-pit methods. The unique qualities of bentonite which make it a locatable material have been recognized by the Board. See, e.g., United States v. Kaycee Bentonite Corp., 64 IBLA 183, 89 I.D. 262 (1982). The primary end uses for processed bentonite, unique from other clays, include well drilling mud component, taconite processing (iron pelletizing) binder, and foundry mold bonding agent. F-bed bentonite is one of several stratigraphic beds of bentonite clay found in north-eastern Wyoming (Tr. I, 72-73; Tr. II, 29-30). <sup>4/</sup> There are eight major companies involved in bentonite mining and processing; American Colloid has been the largest producer over the last several years (Exhs. 11 and 14).

The first witness called at the hearing by the contestants was Gary A. Ballenger, an employee of American Colloid with supervisory responsibility \_

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<sup>4/</sup> The hearing transcripts are divided into three volumes corresponding to the 3 separate days during which the hearing was conducted.

for exploration and development of the "L" group. Ballenger was questioned whether bentonite has been mined or produced from these claims and whether he had stated during unrelated trial proceedings in June 1982 that further exploration would be necessary to determine the marketability of the claims (Tr. I, 27, 45). He answered that F-bed bentonite possesses the same quality as other recognized commercial bentonite such as Clay Spur or Newcastle (Tr. I, 79). He testified that American Colloid has not obtained an operating permit for any bentonite operation in northeastern Wyoming, and would probably not apply for a permit for the "L" claims until 8 to 10 years after judicial litigation and administrative contests of the claims have been completed (Tr. I, 7, 18). He acknowledged on direct questioning he did not believe each claim could be individually mined and marketed at a profit (Tr. I, 8). He also stated that the proposed 120-mile roundtrip haul from the "L" claims to American Colloid at Belle Fourche, South Dakota, was not unusual for the bentonite industry, although it was "on the upper end of the spectrum of haul length" (Tr. I, 5-6).

Ballenger explained his rationale for suspecting deposits of F-bed bentonite existed in the area of the claims prior to conducting exploratory work:

Q [by Marsh] I am going to hold up one of your counsel's exhibits which I have no objection to. It is the, "Bentonite Deposits of the Northern Black Hills District, Montana, Wyoming, and South Dakota," geological survey bulletin, I don't see a date on the outside but I do see that it is by Maxwell M. Knechtel and Sam H. Patterson. Would you like to look that over and tell me if that's what you are referring to:

A [by Ballenger] Yes, that's what I am referring to as the Patterson Map.

Q There is a map in the pocket of that publication?

A Yes.

Q And that was the map you were referring to as the Patterson Map?

A Yes.

Q So that we won't get confused I will just call it the Patterson Map.

A Yes.

Q How do you use the Patterson Map?

A We locate a bed of bentonite and you look at the quadrangle -- U.S.G.A. quadrangle.

Q Does the Patterson Map show then the path of the F-bed throughout the Belle Fourche-Colony area?

A Yes.

Q Is it accurate?

A Yes.

Q Very accurate? I believe in your earlier testimony in civil action you referred to it as sort of being the Bible for locating the F-bed?

A Yes.

Q And that's what it's used for?  
(Exhibit H was marked for identification.)

A Yes.

(Tr. I, 74-75).

Pierce also appeared as a hostile witness called by contestants to testify. He acknowledged that under his arrangement with American Colloid he was to be paid a graduated royalty rate ranging from 22 to 40 cents per ton

of F-bed bentonite mined from his claims (Tr. II, 10). His explanation for a rate comparatively lower than the royalty rate offered for other commercial bentonite clays was the further distance from the processing plant rather than a difference in commercial quality (Tr. II, 10).

Two expert witnesses for the contestants, Richard Thayer and Donald Hentz, presented evidence and opinion on the locatability and marketability issues. Thayer, an independent consultant with more than 12 years of experience with bentonite, examined the "L" claims on March 17 and 18, 1984, accompanied by Jimmy D. Schlosser and others. Thirty-five shovel samples were collected during the field examination. Thayer supplemented those samples with 100 drill samples of the "ZX" claims taken by Jimmy D. Schlosser. Thayer analyzed the 35 surface samples and 25 of the drill samples which he considered representative of the F-bed material throughout the "L" claims (Tr. II, 38-39, 42-47). He discussed in his testimony suitability tests and industry specifications used by the major bentonite industries and commented that, in his opinion, the bentonite samples he analyzed were of poor quality and, treated or untreated, could not satisfy the industry's minimum requirements (Tr. II, 58). Thayer focused on treating the bentonite samples with soda ash or polymers to enable the clay to conform with the identified industry standards. He expressed an opinion that such materials could not be successfully added to the F-bed clay within economic limits because of its low quality (Tr. II, 57-58). After considering sample quality, existing market, mining conditions, and hauling distance to the plant, Thayer concluded the bentonite clay on the "L" claims cannot be mined and marketed at a profit (Tr. II, 59, 132, 145).

Commenting on the topography of the claims, Thayer observed that the claims are bisected by Thompson Creek. He stated that a relatively steep hill emerges on the north side of the creek. The F-bed, he testified, outcrops near the base of the hill, but dips directly into it. He reasoned that such a down-dip would restrict effective pit operations due to a rapid increase in the amount of overburden (Tr. II, 65-72). He found the claims on the south side of the river contained a high degree of erosion, stream washouts, and alluvial overburden (Tr. II, 40-41). He also observed the presence of a relatively high level of physical contaminants, or concretions, in the F-bed clay tested (Tr. II, 41).

On cross-examination, Thayer admitted his lack of previous experience with the F-bed bentonite clay found in northeastern Wyoming (Tr. II, 84). With regard to his 35 shovel samples, he acknowledged that he did not personally select and dig all of the samples, but was sometimes several hundred yards away when some of the samples were obtained (Tr. II, 95-97). He was not certain the samples not taken by him were from the F-bed layer and not the nearby G-bed layer present in the area (Tr. II, 114-16). Moreover, he testified most of the shovel samples were taken from weathered outcrops susceptible to contamination (Tr. II, 98). Thayer also explained he had no specific field notes on Schlosser's drill samples describing the conditions or exact location from where they were obtained (Tr. II, 105-07). Each bagged sample had a "ZX" claim name written on it, but, in most instances, Thayer was unable to find a drill stake to show where the corresponding sample was drilled and was unable to identify with certainty which 20-acre "L" claim the sample represented (Tr. II, 45, 155).

Hentz, an employee of Federal Bentonite, another major bentonite producer, also testified the bentonite from the contested claims could not be marketed at a profit (Tr. III, 29-30). He did not personally examine the claims or samples, but relied upon Thayer's test results to conclude the F-bed clay from the "L" claims was of low quality (Tr. II, 191; Tr. III, 22). His opinion was primarily grounded on Federal Bentonite's unsuccessful experience with one F-bed mine and his own assumption that blending of polymers or soda ash to enhance the qualities of bentonite clay is "cheating" and undesirable for marketing (Tr. III, 24-26, 31). Hentz commented that Federal Bentonite would not market material of this quality and definitely would not attempt to treat it (Tr. III, 10-12, 24-26). On cross-examination, he acknowledged American Colloid and other companies have been mining F-bed bentonite clay for nearly 10 years, but would not verify that it was being marketed successfully (Tr. III, 18-20).

Hentz stated the market for processed bentonite has steadily declined since 1981. He characterized the current conditions as a "buyer's market" where the producing companies are selling high-quality bentonite clay for lower prices in competition with lower quality clays (Tr. II, 173-75). He reviewed sample data prepared by American Colloid and testified 75 percent of the analyzed samples were too low in quality for his company to market and the other 25 percent would require further study to determine marketability (Tr. III, 12-15).

Ballenger and Ed Odom, another American Colloid employee, testified on behalf of contestees. During the course of Ballenger's direct testimony,

contestees conceded the invalidity of 39 of the "L" claims when Ballenger admitted American Colloid would not mine those claims without further exploration and drilling (Tr. III, 83-85). 5/ Ballenger testified that drill sampling was conducted on the remaining 16 claims between April 7 and 10, 1984. He explained that American Colloid drillers sampled the F-bed by drilling through the entire thickness of the clay seam with an auger and placing the material obtained in a sack identifying the test hole. The method and location of drilling were monitored and recorded, and the sealed samples were delivered to the American Colloid laboratory for testing (Tr. III, 62-67).

Ballenger also discussed American Colloid's experience with developing F-bed mines near the "L" claims (Tr. III, 85-87). Based upon his experience

5/ The 39 claims were identified by reference to exhibit P. Those claims not listed were conceded by contestees to lack the necessary mineral analysis or discovery work to support a finding that a discovery had been made.

Exhibit P, the list of the 16 claims at issue here, appears as follows: "L-CLAIMS

<u>Claim Name</u>	<u>Quality</u>	<u>Tons</u>
L-18	Type II, III, IV	88,110
L-19	Type II, IV	78,685
L-20	Type II, IV	44,861
L-21	Type II, III, IV	51,174
L-22	Type II, III	32,238
L-23	Type IV	2,700
L-24	Type II, III, IV	22,840
L-25	Type II, III, IV	20,988
L-56	Type III, IV	39,762
L-57	Type II, III	40,842
L-58	Type II, III, IV	46,400
L-59	Type III, IV	10,409
L-60	Type IV	14,720
L-66	Type III	42,633
L-67	Type III	38,052
L-68	Type III	<u>14,400</u>
		588,787"

The claims are identified as W MC 211313 through W MC 211320, W MC 211346 through W MC 211350, and W MC 211356 through W MC 211358, respectively.

with American Colloid's "successful marketing" of "millions of tons of F-bed bentonite" and test results showing the comparative quality of the "L" claim material, Ballenger offered his opinion that the bentonite found on the 16 claims could be successfully extracted, mined, and marketed at a profit (Tr. III, 87).

On cross-examination, certain 10-acre parcels within the 16 claims were identified as lacking marketable amounts of bentonite clay according to the map prepared from the test results. Ballenger acknowledged that the eight claims north of the Thompson River and the eight claims south of the river would have to be mined in two separate groups and on a contiguous basis to produce a successful operation (Tr. III, 121-22). He reaffirmed his opinion that no single claim in either group contains a deposit of bentonite clay which could be mined and marketed at a profit without regard to the other claims in the group.

Odom testified concerning American Colloid's success in mining and marketing F-bed bentonite. He did not personally visit the claims or test the samples, but grounded his testimony on a review of American Colloid's test results. Odom testified that F-bed bentonite is not worthless, but can be successfully treated under a process developed by American Colloid (Tr. III, 130-31). He offered an opinion that the F-bed bentonite clay from the "L" claims can be marketed at a profit even in a depressed market (Tr. III, 126-33). Although a cost and pricing analysis verifying Odom's opinion was prepared by American Colloid for an operation on the "L" claims,

the analysis was not offered into the record (Tr. III, 132-34). Odom testified that the 16 contested claims could only be developed as two groups and that he was not prepared to demonstrate the marketability of any claim individually (Tr. III, 134-36).

Jimmy D. Schlosser was called as an adverse witness for contestees. He testified he had located the "ZX" claims for bentonite on the same lands as the "L" claims (Tr. III, 140-41).

In his August 24, 1984, decision, Judge Mesch characterized the discovery requirement under the mining laws as mandating a mining claimant to show that a valuable mineral deposit has been found within the limits of each individual claim. He rejected contestees' contention that discovery exists where evidence shows a group of claims can be mined and marketed at a profit where each claim in the group contains significant signs of mineralization. Based on contestees' concession that 39 claims were not adequately tested to demonstrate a viable mineral deposit and testimony that the remaining 16 claims could not be developed individually, Judge Mesch concluded the 55 claims were invalid because they were not perfected by discovery.

In their statement of reasons, contestees challenge Judge Mesch's formulation of the law of discovery. They argue the "independent mine requirement" expressed by Judge Mesch is not the prevailing rule and assert cooperative development of contiguous claims is acceptable and necessary for mining of low-grade minerals such as bentonite clay. Contestees also assert the burden of proof is upon contestants to show the invalidity of the claims by

a preponderance of the evidence and allege the burden has not been satisfied. They claim they have met the traditional standards for discovery with respect to the 16 contested claims through the exhibits and testimony offered at the hearing. They likewise argue contestants' evidence is insufficient to preponderate on the issue that no discovery has been made. They question the credentials of contestants' expert witnesses and allege the shovel and drill samples taken by Thayer were flawed, lacked foundation, and were not distinguished from G-bed bentonite. They challenge contestants' comments that F-bed clay cannot be treated or blended for marketing and claim contestants have not substantiated that processed bentonite clay must absolutely conform to specific industry standards before it can be marketed. They also point out that contestants did not present a cost analysis to support their views on marketability.

Contestants agree in their answer with the Administrative Law Judge's conclusion that the mining laws require the contestee to demonstrate each individual claim can be mined and marketed separately. They argue F-bed bentonite is not suitable for location because it lacks sufficient character as a bentonite clay to be a valuable material and, therefore, conclude F-bed bentonite is not currently marketable. They also contend several 10-acre portions of these claims are conclusively proven nonmineral in character in testimony offered by one of contestees' expert witnesses. Contestants claim there was a presumption of no discovery because the claims were not developed during a substantial period of time and will not be developed for many more years. They also assert sufficient evidence was presented to create a presumption discovery was not made and that contestees failed to rebut that

presumption. They allege that contestees did not submit specific evidence on costs and pricing because they could not support a valid discovery on each claim.

BLM appears in an amicus brief filed on the issue of the correct standard for determining discovery. It argues a single claim of low-grade, high-tonnage material rarely will contain a deposit which can be mined and marketed on an individual basis and without regard to other claims. BLM asserts the long history of judicial and administrative decisions regarding discovery under the mining laws does not establish a requirement that each claim be capable of supporting an independent mine. The agency contends Judge Mesch inappropriately characterized the discovery requirement and requests his decision be set aside with respect to his findings predicated upon an "independent mine requirement."

[1] Review of the discovery requirement begins with section 2 of the Mining Law of 1872, 30 U.S.C. § 23 (1982), which reads in part: "[B]ut no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." Placer claims are subjected to the same conditions as lode claims under the Placer Act of 1870, 30 U.S.C. § 35 (1982). The 1872 Mining Law did not define "discovery," but left implementation of the statutory requirement to the Department and the courts. See Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969). The "prudent man rule" of discovery was developed by the Department as a method to determine the existence of a discovery. This rule of discovery was described in Castle v. Womble, 19 L.D. 455, 457 (1894), as being satisfied

"where minerals have been found and the evidence is 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." This prudent man rule was endorsed as the correct rule of discovery by the Supreme Court in Chrisman v. Miller, 197 U.S. 313, 322 (1905), reaffirmed in Cameron v. United States, 252 U.S. 450 (1920), and Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963). Difficulty in applying this test has focused upon the meaning of "ordinary prudence." The Department has recognized that the rule imposes an objective rather than a subjective test. The standard applied in these cases is that of a prudent man, not necessarily an experienced miner. United States v. Jenkins, 75 I.D. 312 (1968).

Section 1 of the 1872 Mining Law permits entry upon public lands for mining "valuable mineral deposits." 30 U.S.C. § 22 (1982). Thus, a claimant must demonstrate the material which has been discovered is valuable. The "marketability test" was formulated to distinguish a discovery by requiring the claimant to show "the deposit is of such value that it can be mined, removed and disposed of at a profit." Layman v. Ellis, 52 L.D. 714, 721 (1929). <sup>6/</sup> It was adopted as a "logical complement" to the prudent man test by the Supreme Court in United States v. Coleman, 390 U.S. 599, 603 (1968). One of the primary elements of this rule is the existence of a present market

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<sup>6/</sup> One of the first summaries of the rule by the Department appeared at Solicitor's Opinion, 54 I.D. 294, 296 (1933): "[T]he 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."

or demand for the minerals in question. United States v. Bartlett, 2 IBLA 274, 78 I.D. 173 (1971).

Whether a discovery has been made according to the requirements of these tests is a question of fact. Converse v. Udall, *supra*. After Judge Mesch reviewed the facts, he declared invalid for lack of discovery the two groups of eight contiguous 20-acre claims for the reason that the "evidence shows that no single claim contains a deposit of bentonite which can be mined and marketed at a profit on an individual basis and without regard to any of the other claims" (Decision at 2-3). This application of the rules of discovery by Judge Mesch represents an express invalidation of a group of contiguous mining claims on the basis of a rule which will be referred to here for convenience as an "independent mine requirement."

The determination by Judge Mesch that the 16 claims must be capable of development independently was based upon the following analysis:

The Department has consistently ruled that a mining claimant must show that a valuable mineral deposit has been found within the limits of each individual claim in a group of claims, and a showing that all of the claims taken as a group satisfy the requirements of discovery is not sufficient. See, e.g., United States v. Melluzzo, A-31042, 76 I.D. 181 (1969); United States v. Chas. Pfizer & Co., Inc., A-31015, 76 I.D. 331 (1969); United States v. Bunkowski, 5 IBLA 102, 79 I.D. 43 (1972); United States v. Block, 12 IBLA 393, 80 I.D. 571 (1973); United States v. Clifton, 14 IBLA 146 (1974); United States v. Gardner, 14 IBLA 276, 81 I.D. 58 (1974); United States v. Melluzzo, 32 IBLA 46 (1977); United States v. Williamson, 45 IBLA 264, 87 I.D. 34 (1980); United States v. Cactus Mines Limited, 79 IBLA 20 (1984).

In the 1969 Melluzzo decision, *supra*, the Department stated:

92 IBLA 124

\*\*\*The appellants must show as to each claim that they have found a valuable mineral deposit and that a prudent man would have been justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine on that claim. (p. 189). (Emphasis in original)

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Other assertions were made that all the claims are necessary to support the variety of colors and even shapes that are desired by customers and that business will be lost unless the requests can be met (Tr. 681, 907, 1115, 1369).

This strongly supports the conclusion that none of the claims in issue can satisfy the test of discovery in that a prudent man would not invest time and money in any one claim with a reasonable prospect of success in developing a valuable deposit. (p. 192).

In the 1977 Melluzzo decision, supra, the Board of Land Appeals stated:

\* \* \* Where a contestee is attempting to establish the validity of a group of claims he must prove that a valuable mineral deposit exists on each individual claim. An attempt to show that all the claims in several groups, or all the claims in a particular group, taken as a whole, satisfy the requirements of discovery, is not sufficient. An assumption that a discovery on one claim can inure to the benefit of another is a mistake of law. [Citations omitted]. In short, if it takes the mineral from six or more claims together to warrant a prudent man to attempt to develop a valuable mine, then none of the claims may be regarded as valid, as each claim must be supported by discovery of a valuable mineral deposit within its own boundaries. (p. 59).

Decision at 3-4.

The 1969 Melluzzo decision quoted by the Administrative Law Judge was, however, only dicta to the decision to which it was appended as an apparent afterthought. The actual holding in the case was that "each of the claims

is invalid because it was located on land that was not chiefly valuable for building stone as required by the act of August 4, 1982 \* \* \*." Id. at 189. After deciding the case on the ground the claims were invalid under the 1892 Building Stone Act, however, the Solicitor nonetheless went on, stating: "This conclusion is sufficient to dispose of the appeals and makes unnecessary consideration of the question whether the claims are also invalid because of lack of discovery on each of them, as required by the mining law." (Emphasis in original.) Id. The opinion then continued in this vein, as quoted and relied upon by the Administrative Law Judge here. Reliance upon this dictum was error, since it attributed to the gratuitous comments by the Solicitor the weight of a holding, when he was merely taking an excursion at the invitation of arguments raised by the parties on appeal. In actuality then, the 1969 Melluzzo decision simply stands for the proposition that the claims there at issue were invalid because they were not "chiefly valuable for building stone." Id. at 189; and see 30 U.S.C. § 161 (1982).

Similarly, the 1977 Melluzzo decision turned upon application of the Act of July 23, 1955, 30 U.S.C. § 611 (1982), which excluded from the operation of the mining law claims for common varieties of stone and building materials. In the 1977 Melluzzo decision this Board's holding was based upon a finding Melluzzo had not located his claims for a common variety of stone prior to the July 1955 termination date for such claims. Id. at 64. After holding the claims invalid because they were not located prior to July 1955, the Board continued on to discuss what were, again, apparently contentions of the parties, and, echoing the approach taken by the 1969 Solicitor's Opinion, entered into a discussion concerning the perceived need to find the existence

of a valuable mineral deposit on each individual claim. Id. at 59. In 1977, as in 1969, this discussion was dictum, since the case had already been decided by the application of the 1955 Common Varieties Act.

Moreover, both these Melluzzo cases, and the other building stone cases relied upon by the Administrative Law Judge must be distinguished from the situation presented by cases involving deposits of low-grade disseminated ores of valuable mineral. The fact that the Melluzzo decisions and other building stone cases cited also discussed theories of the quantity of mineral needed to constitute a discovery on a mining claim merely confuses the holding in each of the cases. Certainly the language of none of these cases can be relied upon for the proposition announced by the Administrative Law Judge in the decision here on appeal, to the effect that there is a legal requirement that one must be able to develop, from a single claim, an independent mine. It is true that other building stone cases relied upon by the Administrative Law Judge such as United States v. Bunkowski, supra, and United States v. Gardner, supra, repeat the requirement there must be enough material within each claim to warrant developing a valuable mine. This requirement in the building stone cases derives from the limitation upon building stone claims imposed by statute, that each building stone claim must be shown to be chiefly valuable for building stone. As will be later explained in detail, a different rule applies to other mining claims which leads the Board here to the conclusion that the determination whether a claim is valuable for bentonite may properly consider the existence of adjacent reserves on contiguous claims containing large, low-grade deposits of bentonite. 7/

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7/ BLM submits that in making such an evaluation, if the mineral on a particular claim is found to be below the cut-off grade required for a group

The law of discovery in the 1872 Mining Law has on numerous occasions been construed to require each claim in a group to contain valuable mineral within the limits of the claim. See Cactus Mines Limited, 79 IBLA 20 (1984); United States v. Williamson, *supra*. It is not enough for a claimant to offer evidence simply for claims as a unit; the existence of mineral on one claim cannot, by geological inference or otherwise, support the existence of mineral on another contiguous or nearby claim. United States v. Dresselhaus, 81 IBLA 252 (1984); United States v. Feezor, 74 IBLA 56, 90 I.D. 262 (1983). Each claim must be shown to contain minerals of sufficient quality so it can be mined, processed, and marketed at a profit. Cactus Mines Limited, *supra* at 30. The issue of a common discovery among group claims was addressed by the Board in United States v. Foresyth, 15 IBLA 43, 58 (1974):

Both contestant and contestees contend that if any of the claims are valid, all of the claims are valid. We expressly reject such a theory of bulk validation. In order for any claim to be valid, it must be shown that not only a mineral deposit has been found on a claim, but that the deposit on that [emphasis in original] claim is reasonably perceived as marketable at a profit. To put it more plainly, each claim must independently support a discovery.

Unless carefully examined, the pattern developed through these decisions of the Board could logically lead to the conclusion reached by Judge Mesch. 8/

fn. 7

(continued)

operation, rendering the mining operation unprofitable with respect to that claim, then that claim does not contain a discovery (BLM's Brief at 21-22). BLM states it employs this methodology to determine the validity of low-grade, high-tonnage mineral claims and that this complies with the law that "each claim must contain a discovery of a valuable mineral deposit within the limits of the claim." United States v. Dresselhaus, 81 IBLA 252 (1984); United States v. Cactus Mines Limited, 79 IBLA 20 (1984).

8/ The possibility the Department will require each claim to be independently capable of supporting a mine on the basis of decisions like Melluzzo

However, review of the Department's practices illustrates development of the law of discovery has been contrary to his independent mine requirement.

The prudent man rule of discovery focuses in part upon the development of "a valuable mine." The marketability rule is presented in terms of mining, removing, and disposing of a deposit. Within these two formulas there is no indication whether each claim should be considered a separate unit or whether after location and during development several claims may be developed as a group into a working mine. In this inquiry, several early cases are helpful in interpreting the 1872 Mining Law before the development of the two-part discovery rule. In Smelting Co. v. Kemp, 104 U.S. 636, 653 (1881), the Court recognized the common practice of miners to consolidate claims "for convenience and economy in working them," because "the great majority of claims, whether on lodes or on placers, can be worked advantageously only by a combination among the miners, or by a consolidation of their claims." In Jackson v. Roby, 109 U.S. 440, 445 (1883), the Court stated:

It often happens that for the development of a mine upon which several claims have been located, expenditures are required exceeding the value of a single claim, and yet without such expenditures the claim could not be successfully worked. In such cases it has always been the practice for owners of different locations to combine and to work them as one general claim \* \* \*.

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fn.8 (continued)

has been discussed in American Law of Mining (2d ed.), § 35.04[8] (1984); Haggard and Curry, "Recent Developments in the Law of Discovery," 30 Rocky Mtn. Min. L. Inst., 8-1, 8-16 (1984); Knutson and Morris, "Locating, Maintaining and Patenting Groups or Large Blocks of Mining Claims," 26 Rocky Mtn. Min. L. Inst., 517, 620 (1980); Reeves, "The Law of Discovery Since Coleman," 21 Rocky Mtn. Min. L. Inst., 415, 460-64 (1975).

The Supreme Court has thus indicated, in construing the 1872 Mining Law, that where low-grade, commercially valuable materials are involved more than a single claim must be available in order for a mining operation to be economically feasible. More recently, the Department focused on the uncertainties associated with developing low-grade material and observed as follows in United States v. Denison, 76 I.D. 233, 243 (1969):

It is also essential to have an estimate of the quantity of ore within the mining claims since a large quantity of ore would justify expenditures for equipment, etc. which a small deposit could not support. That the quantity of ore is important was established in early Supreme Court cases, such as Davis's Administrator v. Weibbold, [139 U.S. 507] at 523-4, and Chrisman v. Miller, 197 U.S. 313, 322 (1905). A recent case in the United States District Court for the District of Columbia, Pressentin v. Udall, March 19, 1969, Civil Action No. 1194-65, affirming United States v. E. V. Pressentin et al., 71 I.D. 447 (1964), ruled that there had to be a sufficient quantity of mineral so that mining would be an "economically viable venture," and that even though the mineral is marketable, without a showing that the whole mining operation could be profitable mining claims were properly declared void for lack of a discovery of a valuable mineral deposit.

A logical inference to be drawn from these precedents is that of mining claims may be considered together as a group for the purpose of ascertaining the validity of individual claims, so long as valuable mineral is shown to exist on each claim.

Decisions in the Department involving mining claims of high-volume substances are legion. Among those cases are several where the validity of claims was reviewed with the understanding they would be developed under a joint operation. In United States v. Shuck, A-27965 (Feb. 2, 1960), the Department contested the validity of several placer claims in close proximity.

To evidence the prospective profitability of a proposed mining operation for construction gravel, the contestees presented testimony on costs for road building, plant facilities, and other construction associated with joint development of the claims and then estimated the amount of gravel to be extracted from all the claims in order to recover costs and render the operation profitable. Id. at 9. These figures and the contestees' approach were not refuted by the Department, but the claims were ultimately invalidated on the basis of a lack of market sufficient to support the claims when the lands were withdrawn from mining activities. Id. at 13.

Fourteen lode mining claims for a low-grade material, pyroxemite, were contested in United States v. New Jersey Zinc Co., 74 I.D. 191 (1967), and declared invalid on the grounds a single mining operation comprising the claims and patented lands could not be successfully conducted. No economic analysis was presented for any particular claim in order to satisfy the discovery rules. Rather, a cost and revenue estimate was prepared for an open pit mine without reference to individual claims. The hearing examiner declared the 14 claims valid owing largely to the economic analysis. On appeal, after previously disregarded freight costs were added to the analysis, the potential profitability of the operation was considered disproved and the claims were invalidated.

In In Re Pacific Coast Molybdenum Co., 75 IBLA 16, 90 I.D. 352 (1983), the claimant applied for patents of contiguous claims on a large molybdenum deposit. The ore body was shown to be of consistent quality and each claim was demonstrated to contain ample mineralization. Costs for developing a

single mine were estimated and apportioned to each claim according to the estimated tonnage of material to ascertain the profitability of each claim. The Board affirmed the decision to patent the claims.

From these given examples, it is apparent the practice of the Department has been to allow the consideration of a group of claims as a mining unit where the issue of profitability is at stake. Moreover, decisions where the Department restricted the rules of discovery to a showing of the profitability of each claim in a group as a potentially viable independent mine do not appear to exist. In most instances, decisions deal with the concept of developing a "mining operation" or "mine" from a series of contiguous or nearby claims, although specific information is not directly elaborated upon that point. E.g., United States v. Wood, 51 IBLA 301, 87 I.D. 629 (1980); United States v. Martinez, 49 IBLA 360, 87 I.D. 386 (1980); United States v. Melluzzo, 38 IBLA 214, 85 I.D. 441 (1978); United States v. Pittsburgh Pacific Co., 30 IBLA 388, 84 I.D. 282 (1977); United States v. Winegar, 16 IBLA 112, 81 I.D. 370 (1974); United States v. Gunn, 7 IBLA 237, 79 I.D. 588 (1972); United States v. Denison, 76 I.D. at 233 (1969); United States v. New Jersey Zinc Co., 74 I.D. 191 (1967); United States v. Pressentin, 71 I.D. 447 (1964); United States v. Foster, 65 I.D. 1, 3 (1958).

More recently, the Board found 10 contiguous gold and silver claims invalid for lack of discovery on each claim in United States v. Cactus Mines Limited, supra. In his concurring opinion, Administrative Judge Mullen provided this insightful comment on the law of discovery as it pertains to group claims:

While the proof of quantity and quality are often interrelated, a claimant must prove that a valuable mineral is actually present on each of the claims. Once mineral is demonstrated to be present, the proof of sufficient quality and quantity of mineral to warrant development can take into consideration the overall mining operation. There is little question that circumstances exist in which a group of mining claims containing low grade ore can support a mining operation, and thus demonstrate a discovery on each claim, even though taken individually the claims might not contain sufficient quantity of ore of sufficient quality to support discovery. However, that fact does not relieve the claimant from the responsibility for presenting the proof of mineralization and the suitability of the project to low grade high tonnage extraction.

Id. at 32, 33 n.2. Administrative Judge Mullen's remarks were relied upon in United States v.

Dresselhaus, supra at 270, to reverse a determination that three claims were invalid for lack of discovery:

With respect to the Silver Ball No. 7, Silver Ball No. 9, and Silver Ball No. 10 claims, appellants have shown that mineralization exists there which is suitable for heap leaching and contains value high enough to return the costs of extraction and produce a profit. We also conclude that there is reasonable expectation that more ore will be developed through orderly operation of the mine. Appellants presented sufficient evidence to preponderate over the Government's prima facie case as to these claims. See United States v. Cactus Mines Limited, supra at 32-33 n.2 (1984) (concurring opinion of Judge Mullen).

Also a circumstance in support of a construction allowing group claims is the Department's practice of allowing group assessment work, 43 CFR 3851.1, and group patenting. Counsel for BLM has attached to their brief affidavits of two BLM employees with responsibility for administration of the 1872 Mining Law. Both affiants declare it is the practice of BLM where a group of contiguous claims are involved to consider the economic feasibility of a mining operation as a whole. The following examples were provided where a

single patent representing an individual mining operation was issued for large groups of claims: 32 lode claims (647 acres) (molybdenum); 40 lode claims (636 acres) (uranium); 113 lode claims (1,877 acres); 25 lode claims (353 acres); 18 association placer claims (1,640 acres) (bentonite). The second affiant asserts most of the individual claims in those groups of claims could not have complied with an independent mine requirement.

It seems reasonable a prudent man would consider the availability of the entire deposit for development when determining whether to make further expenditures for the development of low-grade materials. Few, if any, mining claimants can demonstrate an economically viable mine within the confines of a 20-acre claim where large low-grade deposits are involved. Moreover, Judge Mesch's construction of the discovery rules would prove prejudicial to the lone claimant who must locate a placer claim on each 20 acres. An association of eight or more persons may locate a placer claim of 160 acres. 30 U.S.C. §§ 35, 36 (1982); 43 CFR 3842.1-1. A showing of profitability for a mine operation involving low-grade ore on a 160-acre claim would be much less onerous than the burden to show independent profitability for eight 20-acre claims. Quite simply, a legal basis is lacking upon which to construe the 1872 Mining Law to distinguish between mining claims with respect to the validity of a discovery based on the difference in size of the claims. Accordingly, Judge Mesch's application of a requirement that each claim be independently capable of being mined and marketed at a profit is rejected.

[2] Before reviewing the evidence received relevant to discovery, it is advantageous to address here an ancillary issue raised by contestants. They have contested the mineral character of the land embraced by the claims.

The charge that lands embraced by a mining claim are not mineral in character can raise two distinct issues. First, it is a challenge to the validity of the entire claim and is the normal adjunct to a charge no discovery exists. Alternatively, it can be applied to placer claims which are supported by discovery, with the effect that the claimant must demonstrate that each 10 acres of the claim are mineral in character. United States v. Williamson, 45 IBLA 264, 293, 87 I.D. 34, 50 (1980). In their pleadings, contestants observe that at the hearing, witnesses for the contestees "testified that various ten-acre parcels of the sixteen remaining contested claims either do not contain any bentonite at all or require 'further exploration' in order to determine if there is bentonite thereon in economic quantities."

Even where a legal discovery has been demonstrated, the locator of a placer mining claim must show the mineral character of each 10-acre tract within the claim if the mineral character of the land has been contested. United States v. Bell, 68 IBLA 367 (1982); United States v. McCall, 7 IBLA 21, 79 I.D. 457 (1972), aff'd, McCall v. Andrus, 628 F.2d 1185 (9th Cir. 1980), cert. denied, 450 U.S. 996 (1981). If the contestee fails to establish the mineral character of any 10-acre tract, that tract is excluded from the claim. Id. Land is mineral in character where known conditions engender the reasonable belief the land contains mineral of such quantity and quality as would justify a prudent man in the future expenditure of his labor and means with a reasonable prospect of success in developing a paying mine. United States v. Lara (On Reconsideration), 80 IBLA 215, 217 (1984); United States v. Williamson, supra. Thus, the test as to whether land is mineral in character is essentially the same as the test for discovery, except for

one important distinction. The mineral character of land may be based solely on less reliable inferential evidence, including geological conditions, discoveries of minerals in adjacent lands, and other observable external conditions upon which a prudent and experienced person would rely. United States v. Bell, supra; United States v. Meyers, 17 IBLA 313 (1974).

The mineral nature of each 10-acre section in the northern group of contested "L" claims was thoroughly reviewed as follows at the hearing:

Q [By Marsh] \* \* \* Now, doesn't this map indicate that there is no bentonite on the northern ten acres of the L-20?

A This map indicates that.

Q Okay. That must be the truth then because Mr. Brorby said you are being real frank about your case?

A Yes.

Q On the northern ten acres of L-20 there is no --

A Well, we show one and a half foot on the north ten up here,

Q One and a half foot?

A Thick, bentonite, yes. It indicates to us that there is bentonite up here and we would probably do more drilling.

Q You would need more drilling on the northern half of the L-20 to determine whether there is any bentonite there that can be marketed, is that correct?

A Yes.

Q Okay. Now, on the L-18 it's in much better shape, isn't it?

A Well, it has bentonite on both the north and the south.

Q There is circles on both the north and the south and triangles?

A Yes.

Q That was the L-18 we are speaking of. Now, the L-19, all the circles are down here with one triangle. One triangle on the northern part, is that correct?

\* \* \* \* \*

Q On the northern half then of the L-19 you would have to do further exploration to determine whether your pit would include that?

A Yes.

Q There isn't anything up there, is there, but one triangle?

A Yes.

Q Now, the L-21, there is no bentonite on the northern ten acres of the L-21, is that correct?

A That is correct.

Q Okay. The L-22, there is no bentonite on the northern portion of the L-22, is that correct?

A That is correct.

Q Okay. Let's see what we have got left. We have got the L-23, it doesn't have anything, does it.

A Its shows an outcrop.

Q But it has no circles, no triangles, no stars or bars or -- it just has an outcrop, doesn't it?

A That is correct.

Q Okay. So, you have to do further exploration on the entire L-23 to determine whether there is bentonite there that can be marketed, is that correct?

A We would mine the outcrop.

\* \* \* \* \*

Q Okay. Now, on the L-24 there is no indications whatsoever of any bentonite on the southern half or southern ten acres of the L-24?

A Yes, that is correct. There is no bentonite on the south ten acres.

Q Okay. That is an established fact. On the L-25 is it an established fact that there is no bentonite on the southern half or southern ten acres of the L Claim?

A No it is not. We indicate an outcrop on the south.

(Tr. III, 105-09). Close scrutiny of contestee's Exhibit Y, American Colloid's map for the eight contested claims north of the Thompson River showing the respective sample drill locations, indicates the contestees have not found appreciable amounts of bentonite in the northern halves of L-20, L-21, and L-22 and the southern halves of L-23 and L-24. Whether or not these 10-acres tracts have been sampled is not disclosed. However, none of the evidence, including the Patterson map, infers mineralization on those lands. A small amount of bentonite was found at one spot in the northern half of L-19; but, according to Ballenger's testimony, further examination is needed before the land could be said to contain a deposit capable of being profitably extracted. Such a description of the parcel's known condition fails to satisfy the test used to determine mineral character of land. See United States v. Lara (On Reconsideration), supra. Moreover, nothing appears in the record to infer mineralization of this parcel.

With respect to the southern group of eight claims, the hearing produced the following discussion:

Q Okay. So, we have five [claims]?

A Yes.

Q Running consecutively L-56, 57, [L-58], L-59 and L-60?

A Yes.

Q Those are numbered moving from east to west?

A Yes.

Q Now, let's just draw a hypothetical line, Mr. Ballenger, right through the middle of that group of claims so that the line running from west to east or east to west, so that what we have done is divided those claims exactly in half.

A All right.

Q So that we have a northern half and we have a southern half. Now, bentonite on the northern half of that block of claims is nearly nonexistent, is it?

A Yes, we show no indications.

\* \* \* \* \*

Q Now, let's go down to L-66. Now, that has bentonite on both the north half and the south half, doesn't it?

A Yes.

\* \* \* \* \*

Q Okay. Now, let's do the same thing with L-67. Now, on L-67 we don't have any bentonite on the north half, correct?

A That is correct.

\* \* \* \* \*

Q Okay. Now, [L-68 9] has a very low tonnage, doesn't it, based on Exhibit P? It is the lowest tonnage that you have indicated?

A No, it is not the lowest tonnage.

Q Okay. It's --

A It has 14,400 tons on it.

9/ The transcript reads L-67 where L-68 is the obvious focus of discussion. The extent of bentonite on L-67 as illustrated by exhibit Z had already been reviewed on cross-examination and exhibit P indicates L-68, not L-67, contains a projected 14,400 tons. Moreover, exhibit Z reflects bentonite readings for the southern half of L-67.

Q Okay. Well, let's just take it -- it's obvious that there is no bentonite whatsoever on the southern half?

A That is correct.

(Tr. III, 115-16, 119-20). Exhibit Z, American Colloid's drill map for the southern eight contested claims, reveals that contestees have not found any significant exposures of bentonite on the northern halves of L-56, L-57, L-58, L-59, L-60, and L-67 and the southern half of L-68. Again, no other evidence suggests mineralization of the lands.

Contestees have not offered any testimony or evidence to show mineralization exists on the identified 10-acre tracts. Rather, the evidence from the hearing substantiates contestants' charges that the land is nonmineral in character with respect to the following: The northern halves of L-19, L-20, L-21, L-22, L-56, L-57, L-58, L-59, L-60, and L-67, and the southern halves of L-23, L-24, and L-68. We, therefore, conclude the preponderance of the evidence does not warrant devoting time and effort to developing those parcels with hope of developing a successful operation. Accordingly, the decision that the contested claims are invalid is affirmed with respect to the above-identified tracts.

[3] In his decision, Judge Mesch discussed contestees' proof without commenting on the quality of contestants' evidence. This practice implies the burden of proof to show the validity of the contested claims has been placed upon the contestee. Such an approach is acceptable where the United States has initiated a contest to satisfy its duty to protect federal lands.

See United States v. Chapman, 87 IBLA 216 (1985). However, the allocation of burden of proof differs in situations where private parties contest the validity of a mining claim, as explained in Massirio v. Western Hills Mining Association, 78 IBLA 155, 160 (1983):

When Government contest proceedings are brought against a mining claim, contestant has the burden of establishing a prima facie case that no discovery of a valuable mineral deposit has been made. When such a prima facie case is established by contestant, the burden then is upon the mineral claimant to show by a preponderance of the evidence that a discovery has been made within the limits of the claim. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). However, as a general rule, in a private contest the burden of proof is on the contestant to establish the invalidity of the contested claim by a preponderance of the evidence. In Re Pacific Coast Molybdenum Co., 75 IBLA 16, 22 n.4, 90 I.D. 352 [357 n.4]; State of California v. Doria Mining & Engineering Corp., 17 IBLA 380, 389 (1974); Marvel Mining Co. v. Sinclair Oil & Gas Co., 75 I.D. 407, 423 (1968). We find some justification for the distinction in that when the Department contests a claim it is exercising its statutory responsibility to adjudicate the validity of a claim to the public lands. A private contestant, on the other hand, is asserting the primacy of a conflicting private claim to the public lands requiring invalidation of contestee's claim. Thus the private contestant may properly be regarded as the proponent of the rule, i.e., the invalidity of the contested claim.

Accordingly, the sum of evidence offered by contestants to establish the invalidity of the claims must preponderate over contestees rebuttal evidence. It is not possible to find such a preponderance of the evidence in light of the testimony and exhibits which have been offered into the record. Contestants have failed to carry their burden of proof.

Contestants infer a presumption of no discovery based upon a perceived lack of development over a long period of time. Such an inference is traditionally considered weak and is easily overcome by a demonstration that the

questioned material is marketable. See United States v. Kaycee Bentonite, *supra* at 220, 89 I.D. at 282; United States v. Hess, 46 IBLA 1, 7-9 (1980). Moreover, the presumption is reserved for Government contests. Id. The contested claims have been held since 1981, although Pierce held partial interest in predecessor claims. The period since 1981 has passed mostly under circumstances where contestees have not been free to openly develop the "L" claims. It would be difficult to infer no discovery under those conditions. Contestants have identified testimony summarizing American Colloid's intention not to develop the claims expeditiously should the claims be upheld and argue such intent infers no discovery. However, given the allocation of the burden of proof in this private contest the fact the claims are not developed will add little weight to contestants' case provided significant evidence is present in the record to show the claims are marketable.

Contestants focus their argument upon a perceived major decline in the demand for bentonite, said to produce a "buyer's market," that is to say, producing companies are willing to sell quality clays for lower prices in competition with lower-quality clays (Tr. II, 175). The recent decline in bentonite sales is attributable to many factors; current lack of demand adversely affects all bentonite producers, according to Hentz (Tr. II, 172-75, 197-200). The following excerpts from contestants' Exhibit 11, a discussion on bentonite production, illustrates some then-current problems in marketing bentonite:

The total U.S. Market peaked in 1981 at 4,310,000 tons and dropped to 2,475,000 tons in 1982; 63% of the 1981 level.

\*       \*       \*       \*       \*       \*       \*

The Drilling Industry is the predominate consumer in the Industry and continues to consume nearly 50% of the total bentonite production. Even though 1982 consumption dropped only 30%, the Hughes Tool Co. rotary rig count bottomed out at 1,846 rigs in April 1983 compared to 4,521 rigs at the December 1981 peak, a 59% reduction \* \* \*.

The Iron Ore Pelletizing Industry took a dramatic drop in 1982 at only 44% of the 1981 level. \* \* \* Indications in 1983 are that the industry is restabilizing at a much lower level of operation.

The Foundry Industry reflects the general economy; particularly the automotive industry. In general, the Industry has seen its heyday; however, 1983 indicators are that this industry has bottomed out and a slow recovery is taking place.

\* \* \* \* \*

\* \* \* At the close of 1981, there was a theoretical installed capacity of 4.87 million tons per year.

\* \* \* \* \*

With 1983 being a copy of 1982, the Industry was in serious trouble. The Industry was operating at less than 1/2 capacity and suffering a 1/3 reduction in sale price.

\* \* \* \* \*

It will probably be well into 1985 before there is sound stability within the industry and the ensuing years should prove interesting. It will probably be well into the 1990's before the Bentonite Industry's installed capacity will be utilized.

Exhibit 11 at 3-10. See also Exhibits 41-45. Contestants' witnesses and exhibits strongly suggest a negative outlook for bentonite sales and extreme difficulty in marketing anything but high-quality bentonite (Tr. II, 145-46). Contestants did not, however, present specific evidence which would establish that F-bed material in particular is unmarketable in a depressed market.

Contestants' case moved from a discussion on marketability to one on standards and specifications for bentonite. The major bentonite-consuming industries each desire special qualities in the clay they use associated with their specific needs. Contestants asserted that untreated F-bed material from the "L" claims could not comply with any of the established specifications and, in the depressed market they have pictured, would not be marketable. Contestants' Exhibits 20 through 24 and Exhibit 29 discuss the standards or specifications formulated for bentonite used in drilling, oil-well cementing, taconite pelletizing, and foundry binding. Comparing his test results with those standards, Thayer testified as follows:

Q [by King] Now getting back to your samples listed on Exhibit 19, I believe, how many of those samples showed the presence of bentonite suitable for use in the well drilling industry as majored [sic] by the [American Petroleum Institute] specifications?

A [by Thayer] None of the samples met the minimum specifications.

Q How many of those samples showed bentonite that was suitable for the taconite industry based on the specifications in that industry which you are familiar with?

A None of the samples met the minimum specifications.

\* \* \* \* \*

Q \* \* \* Now is there anything that can be done to bentonite to enhance the quality and thereby meet the parameters of API and the water absorption standards?

A Oftentimes bentonites are blended to improve their quality and oftentimes chemicals are added to improve the quality of the bentonite.

\* \* \* \* \*

Q \* \* \* How many of the samples were suitable for use in the oil well industry either in its original state or by treatment?

A I never actually went to the extent of adding polymer to all of these samples to see if the barrel yield could be raised. I didn't do that because I felt that in all cases adding polymer would help the samples so I relied on the fact that polymer can only be used within certain economic levels.

Therefore, when I compare it to samples that are of too low quality initially I determine that polymer cannot be successfully added or economically added but in samples where the quality was high enough initially I assumed polymer would be adequate in all instances and economical such that four or five of the total number of samples had sufficient initial quality I feel that they could be economically treated up to oil well specifications.

Q Four or five of the --

A Of the 60.

Q Four or five of the 60 samples?

A Yes.

Q What percentage would that be?

A I guess my mathematics aren't that good.

Q Based upon your analyses of the original quality and also the treatability of these samples how many samples show bentonite which at least with treatment could be suitable for use in the taconite industry?

A I feel that none of the samples would be suitable for that end use in view of the fact that the amount of soda ash that I added was probably at the economic limit and none of the samples would meet the specification even after treatment.

(Tr. II, 55-58). Hentz testified in general that F-bed clay probably could not satisfy foundry specifications, but did not specifically relate his testimony to the "L" claim material (Tr. II, 178-85). However, Hentz later testified Thayer's test results indicated the sampled bentonite material would not meet the standards for any of the markets supplied by Federal Bentonite (Tr. III, 11). He stated that it would not be his company's policy

under present market conditions to blend or treat F-bed material even where they could possibly achieve those standards (Tr. III, 11-12, 24-26).

When questioned on cross-examination, Hentz testified to the effect that the established standards and specifications are not strictly enforced by the industries. With regard to the standard for the foundry industry, Hentz agreed that where a customer is satisfied with a beneficiated or blended material, the supplier will continue to market it. He acknowledged the API standard specifies unadulterated or unbeneficiated bentonite clay but the industry practice is to add necessary elements to the clay to comply with the specifications (Tr. III, 30-38). 10/

Regarding the purported inability of the F-bed clay to comply with industry standards, Odom testified:

Q [by Brorby] Is it your opinion, sir, that the F-bed bentonite located on the L Claims can be marketed at a profit in a down cycle as well as in an up cycle?

A Yes, it is my opinion that it can.

Q Do you have any problems fulfilling the various API standards that we have been talking about here in this trial with F-bed bentonite?

A No.

Q Is this a trade secret which American Colloid guards as a means of doing this?

A Yes.

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10/ In United States v. Kaycee Bentonite Corp., supra, the Board held the deposit of bentonite under review, shown to be marketable for special uses, was an exceptional clay under the mining laws, even though blending and additives were necessary to make the deposit suitable for the stated uses.

Q You heard Mr. Hentz's testimony concerning his judgement it would be a waste of everyone's time to do much with F-bed. Are you in agreement with that testimony?

A Absolutely not.

(Tr. III, 129-30). Odom explained F-bed material has unique properties which enable it to become very marketable if processed correctly (Tr. III, 130-31). Contestees responded to nonmarketability of F-bed material as alleged by contestants with the following testimony on development of other F-bed mines for American Colloid:

Q [by Brorby] \* \* \* Mr. Ballenger, there has been some discussion concerning the Ramey Claims?

A [by Ballenger] Yes.

Q What are those?

A The Ramey property. It is 15 miles from our Belle Fourche plant site where we are mining F-bed.

Q Is that in South Dakota or Wyoming?

A South Dakota.

Q What is the royalty that you are paying on the Ramey Claims?

A Eighty cents per ton.

Q And that is F-bed bentonite, is that correct?

A That is correct.

Q Do you know approximately how many tons of F-bed bentonite has been mined by American Colloid?

A In excess of a million tons.

Q Do you know whether or not that F-bed bentonite has been sold?

A Yes, it has.

Q Have you on behalf of American Colloid patented mining claims?

A Yes.

Q Have you achieved patents on F-bed bentonite from the BLM?

A Yes.

Q Do you know approximately how many?

A We have received several near the Ramey property.

Q Have there been others as well?

A No.

Q Okay. The patents which you have received from the BLM on the F-bed bentonite, have they differed in quality from the L Claim bentonite that we are talking about?

A Not to my knowledge.

Q Have they differed in quantity?

A No.

(Tr. III, 85-87). Ballenger also identified an F-bed mine which was in current operation about 8 miles north of the contested claims (Tr. I, 86-89).

A mining claimant is justified in initiating a claim on mineral showings which are the same as those where actual mining operations have been successfully brought to fruition. See United States v. Winegar, *supra* at 126, 81 I.D. at 376. However, specific information on marketing the F-bed material previously mined by American Colloid was not provided and, as a consequence, a conclusion cannot be drawn with absolute certainty about the potential success of the contested claims.

For contestant, Hentz testified about Federal Bentonite's experience with an F-bed mine, the Geisinger Pit, where 95,000 tons of F-bed material were purportedly mined and stockpiled from that operation. Hentz estimates that only 85,000 tons of the material had been marketed between 1978 and the time of the hearing by blending it with higher-quality clays. He attributed the poor marketing performance to the substandard quality nature of the F-bed material and did not feel the remaining 10,000 tons could be marketed under present market conditions (Tr. III, 176-78, 182-84).

Contestees have challenged the accuracy of the samples obtained by Thayer. Most of Thayer and Hentz's testimony was based upon an evaluation of those samples. However, Thayer could not support the accuracy of the methods by which the samples were obtained. Sample test results have limited probative value concerning the existence of valuable materials on a mining claim when they are not supported by sufficient evidence to show how and where they are taken. United States v. Parker, 82 IBLA 344, 91 I.D. 271 (1984). On the other hand, Hentz attempted to impeach American Colloid's sampling of the contested claims in the following exchange:

Q Okay. And out of that 194 actual samples [taken by American Colloid] how many would generate some interest in Federal Bentonite?

A About 43.

Q About 43. So, that's what about?

A About a fourth or so.

(Tr. III, 13). Hentz did not identify the claims which were among those which showed potential value. Whether or not the 16 contested claims remaining under consideration are included among the group showing a potential value remains a question of speculation in the record.

Contestants did not present specific data on the costs of developing and marketing a bentonite operation. Testifying for contestees, Odom discussed a detailed cost estimate and analysis prepared by American Colloid for mining, processing, and marketing F-bed clay from the "L" claims (Tr. III, 132-35). The analysis assumed mining of the claims would take place in two groups and accepted as stated the existence of current market conditions described by American Colloid (Tr. III, 133). The data was shown to contestants and their expert witnesses, but was not offered into evidence because of the existence of purported trade secrets disclosed by the data. Where a party is reluctant to introduce purported evidence into the record to clarify crucial elements in his position, the probative value of the evidence is greatly diminished. See United States v. Chapman, 87 IBLA 216, 221 (1985). Odom concluded his testimony with the following observations:

Q And the testimony, attempting to summarize it, is that any individual claim you could not mine, process and market at a profit, if you look only as an individual claim, is that true?

A True, of any other company too.

Q But your testimony is taking the south group of the claims and operating those in a joint fashion when those claims could be mined, processed and marketed at a profit?

A Yes.

Q And the same thing would be true of the north group?

A Yes.

Q And that is how you based your economic summaries and forecasts?

A Yes.

(Tr. III, 135). Both Odom and Ballenger testified not only as employees of American Colloid, but also as experts concerning the processing and marketing of F-bed bentonite. Ballenger was American Colloid's exploration and mine development supervisor for the 3 years preceding hearing on the contest (Tr. I, 3). Odom was an employee with advanced academic degrees in geology, and a specialist in clay and industrial materials (Tr. III, 123). The testimony of these men was grounded not only in a knowledge of the proprietary process used by American Colloid to treat F-bed bentonite, but more importantly, as experts in the field their testimony was based upon the totality of their work experience, education, and training. Their qualifications to give expert testimony at hearing were not questioned or denied. It is axiomatic that opinion evidence, such as they supplied, may be given by expert witnesses. See, e.g., 32 C.J.S., Evidence § 457 (1964); II Wigmore on Evidence, § 557 (3rd ed. 1940). While such testimony may be tested, as was done here, by showing that some element of the basis for the opinions expressed was not fully disclosed or cannot be explained without disclosure of proprietary information, that circumstance is not enough, alone, to totally discredit their proof. Id. While under such circumstances the weight of the evidence is diminished, the expert opinions expressed may be relied upon, absent a showing the expert has been impeached. Since there is nothing in the record to suggest the testimony of these men is not entitled to some

weight, it would be error to totally discount their opinions in the manner and for the reasons given by the dissenter, simply because part of the background comprising their expert knowledge which included the American Colloid process for treating bentonite was not disclosed. To do so would not only be legal error, it would be gross exaggeration of the importance of this single circumstance. Moreover, nowhere in the record is there a suggestion that contestants were not in fact aware of the nature of the beneficiation process used by American Colloid. What does appear is that American Colloid was not willing to publish information concerning the process formula as part of the record.

The preceding quotations from the record and summarization of the evidence offered by the parties demonstrate the failure by both parties to prove their cases by a preponderance of the evidence. Major flaws are found in the essential elements of both contestants' proof and contestees' rebuttal evidence. Although contestees have not conclusively proved discovery of a valuable deposit for the two groups of claims, contestants have not convincingly shown the F-bed clay from the "L" claims to be either unlocatable or unmarketable. Because of the allocation of burden of proof in a private contest, contestants bear the responsibility to present evidence which preponderates on the issues and demonstrates the invalidity of the contested claims. They have not done so as to these 16 remaining claims. They have not satisfactorily shown the portions of the 16 contested claims at issue here do not possess a deposit of bentonite capable of being mined, removed, and marketed at a profit. Therefore, the Board finds the 16 contested claims, minus the described 10-acre portions found to be nonmineral in character, are not shown

to be invalid by this record contest. 11/ However, this conclusion does not imply there is a discovery of a valuable bentonite deposit present on the claims, nor does it provide immunity for the claims from other possible contests.

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

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11/ The dissent, by adopting the contestants' arguments concerning the analysis to be given the evidence received at hearing, falls into a double error. First, the dissent accepts at face value general statements and conclusions by contestants' witnesses concerning the alleged low-grade and lack of marketability of F-bed bentonite. Apparently aware of the danger inherent in this approach, the dissenter seeks to avoid the obvious logical consequence of his stated position by noting that his opinion concerning the F-bed should not be considered proof in future cases of the valuelessness of F-bed bentonite. See Dissent footnote 2. Second, and more importantly, the dissent focusses upon contestees' reluctance to disclose information concerning their secret processing methods used for preparing F-bed bentonite for market, and decides contestees should be punished for this reticence. This has the effect of shifting the burden of proof on the marketability issue onto contestees. While this would be proper in a Government contest proceeding, in the context of this private contest it is error. As previously explained in this opinion, the general nature of contestants' evidence on this issue, considered in the light of the undisputed proof that American Colloid has successfully marketed F-bed material, requires dismissal of the contest complaint. Ultimately, given the state of the record in this contest, the acceptance of contestants' arguments to the extent given by the dissent must logically rest upon a tacit acceptance of the "independent mine requirement," which is a legally untenable position. Only such a conclusion, however, would permit a finding there was proof by contestants that F-bed bentonite from contestees' claims is unmarketable, for only reliance upon the "independent mine requirement" can entirely foreclose the possibility that contestees' claims could be marketed at a profit in the face of evidence that other sales of F-bed material have been made. As the dissenter points out, contestees have offered to deliver to this Board Exhibit "U," their withdrawn evidence which is claimed to contain proprietary data. Were this single exhibit as important as the dissenter believes it to be, there would be nothing wrong with such an approach which substantially conforms to current Board practice in cases involving proprietary data received in oil and gas leases found to be located within a known geologic structure.

is affirmed as to these 39 claims which concededly have not been shown to have discovery of minerals, and reversed as to the 16 claims remaining, except for 10-acre parcels shown to be nonmineral. This private contest is ordered dismissed as to those 16 claims.

Franklin D. Arness  
Administrative Judge

I concur:

Gail M. Frazier  
Administrative Judge.

CHIEF ADMINISTRATIVE JUDGE HORTON CONCURRING IN PART AND DISSENTING IN PART:

This private mining claim contest now concerns whether contestees' 16 bentonite "L" claims satisfy the discovery requirements of the 1872 Mining Law. Contestants first allege the claims do not contain mineral locatable under the mining laws on grounds that F-bed bentonite has no greater value than common clays, which the Board has recognized are not locatable. United States v. Peck, 29 IBLA 357, 84 I.D. 137 (1977). Contestants also allege that whether the 16 L claims are mined independently or as a group venture, the evidence shows they cannot be mined and marketed at a profit.

I agree with the majority that contestants have not proved that F-bed bentonite is not a valuable mineral. The record merely establishes, although the Administrative Law Judge did not so find, that it is a lower-quality bentonite than that found in the New Castle Bed or Clay Spur Bed. Contestants' own expert witness, Hentz, employed by Federal Bentonite, who testified that his company is not interested in and does not currently mine F-bed bentonite, acknowledged that approximately 25 percent of the samples taken from the L claims "would generate some interest in Federal Bentonite" (Tr. Vol. III, 13). In addition, contestee American Colloid has obtained patents for other F-bed bentonite claims (Tr. Vol. III, 85-87).

For the reasons given in the majority opinion, I also agree that it was error for the Administrative Law Judge to require that each of contestees' claims independently satisfy the marketability test for discovery without regard to adjacent claims in the claim group. The presence of

adjacent reserves on contiguous mining claims containing large, low-grade deposits of bentonite is properly considered in determining whether the bentonite in a particular claim is valuable.

What the Administrative Law Judge should have held in this case and the majority errs in not discerning from the evidence of record is that the L claims were shown to be unprofitable even if mined as a group operation. More precisely, contestants made a prima facie showing of lack of marketability which contestees failed to rebut.

Contestants adduced through expert testimony and documentary evidence that the F-bed bentonite from the L claims fails to meet industrial specifications for the major consuming industries. The evidence presented on this point is summarized in the majority opinion but no conclusions are drawn.

In contrast to the specific testimony of contestants' expert witnesses, Thayer and Hentz, to the effect that the F-bed bentonite on the L claims does not satisfy accepted industrial specifications in either a natural or treated condition, contestees offered opinion testimony that the F-bed bentonite on the L claims was similar in quality to F-bed bentonite owned on other claims which had been successfully marketed. Nonetheless, American Colloid Company has never marketed the bentonite on the L claims and contestees' claim of marketability was left "totally unsupported by the submission of any actual industrial specifications maintained by customers of American Colloid Company or by any other industrial consumer" (Answer at 23).

Contestants put on considerable evidence that because of its inferior quality, F-bed bentonite is shunned by the major companies, except American Colloid Company (Tr. Vol. II, 61-64, 135-40, 175-86; Tr. Vol. III, 126-27). Bare assertions by American Colloid Company without supporting evidence that it successfully markets F-bed bentonite and that the F-bed bentonite before us can also be so marketed should not be allowed to overcome contestants' prima facie showing that the mineral is not considered marketable.

Contestants' showing that F-bed bentonite is not marketable is based in part on the declining market for bentonite that has been occurring since 1981:

This decline is attributable to several factors, including the general state of the domestic economy, competition from foreign sources of steel and reduced usage of steel in automobiles leading to a resultant decline in domestic iron and steel production, and decreased domestic drilling activity. Tr., Vol. 1, 6; Vol. II, 145-146, 172-175, 197-200; Vol. III, 128-129; Contestants' Exhibits 11, 12, 13, 14, 15, 38, 39, and 41-48 (inclusive). At present, the bentonite producing industries are utilizing only about one-half of available production capacity and producing only about one-half of the volume of bentonite produced in 1981. Contestants' Exhibits 11, 12; Tr., Vol. II, 133, 198-199. Before 1981, it was a "seller's market"; after 1981, it became a "buyer's market" and producing companies are willing to sell high quality clays for low prices in competition with lower quality clays. Tr., Vol. II, 173-175.

(Answer at 6).

Contestees' response to this private contest has been that we accept the unsubstantiated claims of two American Colloid Company employees,

Ballenger and Odom, that the company can make a profit mining F-bed bentonite. On grounds they did not desire to disclose trade secrets on how American Colloid Company can accomplish this, contestees chose not to place in evidence an exhibit purportedly corroborating this position:

The Contestees also called as a witness Dr. Odom who is in charge of American Colloid's F-Bed utilization program. [Tr. Vol. III, p. 131] Dr. Odom has a Ph.D. in geology and was formerly a professor at Northern Illinois University teaching mineralogy and industrial minerals. [Tr. Vol. III, p. 123] Dr. Odom testified that he had made a detailed cost analysis concerning development of the F-Bed bentonite on the sixteen "L" claims at issue. This economic summary or cost analysis was based on "today's business conditions" to reflect "today's marketplace." The economic summary includes selling price, access fees, equipment costs, depreciation costs, stripping costs, and the various costs involved in determining a final production cost and profitability of the mining operation [Tr. Vol. III, pp. 132-137]

Based on the lab tests performed on the samples from each of the sixteen claims, Dr. Odom testified that the F-Bed bentonite from the claims can meet the industrial specifications and be marketed at a profit for all of the major uses for bentonite, including uses in the taconite, oil well and foundry industries <sup>4/</sup> [Tr. Vol. III, pp. 126-130]

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<sup>4/</sup> It is a trade secret how American Colloid processes the F-Bed bentonite. [Tr. Vol. III, p. 130] In order to maintain the confidentiality of American Colloid's mining, processing and marketing of F-bed bentonite from its competitors (which are directly involved in the present contest), the economic summary, Contestees' Exhibit U, was not put in the record although it was used at the hearing in connection with Dr. Odom's testimony and shown to opposing Counsel.

(Statement of Reasons at 8).

Initially, it should be noted that "Exhibit U" is described by contestees as an "economic summary or cost analysis" for F-bed mining from the L claims. This economic analysis is said to depict "selling price, access

fees, equipment costs, depreciation costs, stripping costs, and the various costs involved in determining a final production cost and profitability of the mining operation." It is not specifically described as containing American Colloid's purported trade secret as to how it processes F-bed bentonite. The majority's characterization of Exhibit U that it sets forth American Colloid's "process formula" (opinion at 152) and its "secret processing methods" (opinion at 153, n.2) is purely speculative. It is more reasonable to speculate that it merely sets forth what contestees specifically recite. What is clear is that contestees did not desire to have its economic summary subjected to cross-examination.

I am in complete agreement with counsel for contestants that contestees' defensive strategy cannot be rewarded. Contestants state:

In conclusion, it should be emphasized that in distinction to failing to submit any specific cost or pricing evidence in support of their "group discovery" opinions, here the Contestees actually refused to submit that evidence even though it was apparently in hand. There is only one reasonable inference to be drawn from that refusal. If an entire group of mining claims could be found valid on the basis of a supposedly expert opinion of "group profitability" in the very face of strong countervailing evidence and the same expert's actual refusal to disclose available cost and pricing data which might support his opinion, then the entire administrative private contest procedure would be an absolute mockery. [Emphasis in original.]

(Contestants' Final Brief at 33-34).

The Department and the courts have long regarded mining claim contests as formal adjudicatory proceedings properly governed by the structures of

the Administrative Procedure Act (APA), 5 U.S.C. §§ 554-557 (1982). United States v. O'Leary, 63 I.D. 341 (1958); Adams v. Witmer, 271 F.2d 29 (9th Cir. 1958). As adversary adjudications, parties are expected to make their own case.

While the APA generally prohibits the receipt of ex parte evidence or communications on the merits of a case, 5 U.S.C. § 554(d), 5 U.S.C. § 557(d)(1)(A) (1982), these provisions contain the caveat "except to the extent required for the disposition of ex parte matters as authorized by law." Numerous federal agencies have well-defined procedures to govern Administrative Law Judges or the agency in the conduct of in camera proceedings and the receipt of ex parte communications authorized by law. See, for example, 16 CFR 3.45 (Federal Trade Commission); 29 CFR 18.46 (Department of Labor). The Department of the Interior is currently studying draft rules in this regard. However, the mere absence of such procedural rules has never precluded the right of any party to assert entitlement to in camera or ex parte review of evidence otherwise authorized by law. In this case, there does not appear to have been any attempt by contestees to have "Exhibit U" received in evidence at the hearing under means that would protect its alleged confidentiality. 1/

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1/ Contestees advise, however: "Exhibit 'U' contains confidential proprietary information and therefore was not made of public record in the proceeding. American Colloid will make Exhibit 'U' available for inspection by the Board at any time upon request" (Contestees' Brief in Response to Statement of Intervenor BLM). Contestees misperceive the function of the Board in a mining claim contest appeal. Our task is to review the decision made by the Administrative Law Judge based on the record made before him during the evidentiary hearing. In accordance with 5 U.S.C. § 556(e), the "transcript of testimony and exhibits, together with all papers and requests filed in the

The proper disposition of this appeal would be to affirm contestees' claims as invalid based on a showing that the F-bed bentonite on the L claims is not marketable even if mined as a group operation.

2/

Wm. Philip Horton  
Chief Administrative Judge.

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fn. 1 (continued)

proceeding, constitutes the exclusive record for decision" by the Administrative Law Judge. While the Board possesses de novo review authority under 43 CFR 4.1, that simply means it "has all the powers which it would have in making the initial decision" 5 U.S.C. § 557(b) (1982). De novo review authority in an APA proceeding does not mean a party may forego the introduction of evidence before the Administrative Law Judge in favor of its submission to the appellate tribunal.

2/ Such a result in this case would not bar a demonstration in another case that F-bed bentonite can be mined and marketed at a profit.

