

UNITED STATES
v.
URBAN HARENBERG, ET AL.

IBLA 71-196

Decided January 16, 1973

Appeal by both parties to Contest No. Arizona 756 from the decision of Administrative Law Judge Dent Dalby, holding the Harenberg No. 1 mining claim to be valid to the extent of 40 acres.

Affirmed.

Mining Claims: Common Varieties of Minerals: Generally

A deposit of volcanic cinders which are suitable for use in the manufacture of cement blocks must be regarded as a common variety mineral material within the context of the Act of July 23, 1955, when the evidence shows that other such deposits occur commonly in the area and are similarly used, and the fact that the subject deposit has qualities which are particularly well-suited to this purpose does not alter its essential character as common cement block material.

Mining Claims: Contest--Mining Claims: Discovery: Marketability

A favorable showing of bona fides in development is recognized as one the factors which can serve to demonstrate the marketability of a mineral from a particular deposit, but development is not a requirement of the law and the fact of development or nondevelopment is merely evidentiary, the test being whether the present capability of profitably extracting the mineral exists, and, where location was barred after a given date, whether the mineral could have been extracted and removed profitably prior to the critical date.

Mining Claims: Generally

Where one engaged in the manufacture of block from volcanic cinders demonstrates a history of problems with material sources, an expansion of the business over 25 years of continuous operation, and a large capital investment in plant facilities, it was reasonable and prudent for him to locate a mining claim for cinders and to hold it as a reasonable reserve source of supply.

Mining Claims: Discovery: Geologic Inference

Geologic inference may be relied upon to establish the extent and potential value of a mineral deposit which has been physically exposed within the limits of the claim.

Mining Claims: Placer Claims

Where an association placer embracing 160 acres is located by eight associates, and where prior to the discovery of a valuable mineral deposit, six of the co-locators transfer their interest to the other two, a subsequent qualifying discovery by the remaining two co-locators will serve to validate the claim to a maximum area of 40 acres.

APPEARANCES: Richard L. Fowler, Attorney-in-Charge, for the Forest Service, and Urban M. Harenberg, pro se.

OPINION BY MR. STUEBING

Both the Forest Service and mining claimants have appealed from the Administrative Law Judge's decision of January 18, 1971, holding that the Harenberg No. 1 placer mining claim is valid to the extent of 40 acres. 1/

The claims was located as a 160-acre association placer, and situated in sections 7 and 18, T. 23 N., R. 8 E., G.& S.R.M., in the Coconino National Forest, Arizona.

In their respective appeals the Forest Service contends that the entire claim is invalid and the claimants, Urban and LaVaun Harenberg, contend that it is valid as to 80 acres rather than 40 acres.

The contestant charged, inter alia, that the cinders present on the claim are a common variety within the context of the Act of July 23, 1955, 30 U.S.C. § 611 (1972). The contestees maintained that they have a special and distinctive value by reason of certain physical properties which make them especially suitable for the manufacture of cinder block. The Judge applied the standards enunciated in United States v. Minerals Development Corporation, 75 I.D. 127 (1968), and found that although the cinders in question are of better quality than some of the other deposits in the area, they

1/ The title of the presiding officer at the time of the hearing was "Hearing Examiner". This has since been changed to "Administrative Law Judge" pursuant to the order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

do not possess a unique property or have a special and distinct value. We agree that the cinders at issue are a common variety. The evidence shows that other such cinder deposits occur commonly in the area and are similarly used. The fact that this deposit had some qualities which make it particularly well suited for use in block manufacture does not alter its essential character as common cement block material. As such, the cinders were not subject to location after July 23, 1955, and any claim located for such material prior to that date would have to have been validated by a discovery of a valuable deposit of the mineral prior to the date of the Act.

Contestee Urban Harenberg and his seven co-locators located the 160-acre Harenberg No. 1 mining claim for cinders on March 30, 1954.

The critical issue, then, is whether the location was validated by the discovery of a valuable deposit prior to July 23, 1955. The Judge held that such a discovery had been timely accomplished. The evidence supports that conclusion.

The record indicates that Urban Harenberg has operated a cinder block manufacturing business at Flagstaff, Arizona, since 1947. He obtained cinders from several sources during that time. He testified that he needed various types of cinders from three different sources which he blended to make the best block. One of the sources supplied red cinder, another supplied both black and red. [Tr. 59]. Beginning in 1947 one of the sources was Zanzucchi pit, [Tr. 87] which was on private property and from which he purchased cinders. He regarded this as a temporary supply. [Tr. 69]. The Zanzucchi pit, was "running out" and by 1955 he was having problems getting a big enough supply. [Tr. 78, 99]. He had located what he called the Sheep Hill claims for cinders with a Mr. Forehand, and he took cinders from Sheep Hill after the Zanzucchi pit ran out. But Forehand wanted Sheep Hill exclusively for himself and after some negotiation Harenberg let him have it in exchange for Forehand's interest in what was referred to as "the State claims." Harenberg testified that he had much trouble in dealing in with the people at Sheep Hill and also that they were "running into too much fines in parts of the pit," so he decided it was not a reliable source. [Tr. 88]. Harenberg then tried using cinders from the Wildcat Hill claim owned by Tito Martinez, and although the cinders were not the best "we made do with it" by utilizing a crushing program, "but it wasn't too successful." [Tr. 89]. Harenberg also uses some cinders from another source called the Lava claim located in 1952 [Tr. 52], "but that is not as good a cinder." [Tr. 77]. The so-called State claim is actually a lease of State-owned land. [Tr. 50, 90, 105]. Harenberg does not know how long that deposit will last. [Tr. 50].

Appellant Harenberg asserts that he began building his first block plant in 1945 and was joined in the business by his brother in 1946. They produced their first block in 1947 and have operated continuously ever since. [Tr. 86]. The capacity of the original plant was one cubic yard. [Tr. 52]. The present plant is the third one they have built. [Tr. 51]. It allegedly cost \$750,000, partly financed by a \$200,000 loan from the Small Business Administration. This plant, currently operating at one-sixth capacity utilizing one shift per day, consumes nearly 200 yards of cinders per day. [Tr. 55]. On an industry-wide basis Harenberg ranks his plant as medium-sized with a foundation to become a large plant, since the requisite facilities are already built. [Tr. 72]. The market is increasing. [Tr. 91]. He describes volcanic cinders as "the life blood of the Harenberg Block Company." [Tr. 76]. In his argument on appeal Harenberg states that his four sons are employed in the business and he anticipates that someday their sons will also be so employed.

On the basis of this history of problems with material sources, the expansion of the business, 25 years of continuance operation, and the amount of the invested capital, it would appear eminently prudent and reasonable for Harenberg to locate and hold a source of supply in reserve. It also serves to rebut any inference of invalidity raised by the lack of development prior to July 23, 1955. Cf. United States v. Clear Gravel Enterprises, Inc., 2 IBLA 285 (1971). A favorable showing of bona fides in development is recognized as one of the factors which can serve to demonstrate the marketability of a mineral. United States v. Albert B. Bartlett, et al., 78 I.D. 173 (1971). But development of a claim is not a requirement of the law, and the fact of development or non-development is merely evidentiary. The time honored test, first enunciated in Castle v. Womble, 19 L.D. 455 (1894), is whether a prudent man would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Where the mineral in question is a common variety this test is satisfied where the evidence is sufficient to reasonably establish that the claimant could have extracted and removed it profitably prior to July 23, 1955, and presently. United States v. Barrows, 404 F.2d 749 (9th Cir. 1968), cert. denied, 394 U.S. 974 (1969).

Urban Harenberg testified that when he and his co-locators located the Harenberg No. 1 claim in 1954 he dug about six holes "all over the place, trying to find the depth of my overburden and what type of material I would find below." He stated that these holes were about four feet deep, so that the overburden was removed and the cinders beneath were dug to a depth of 18 to 24 inches. [Tr. 61, 72, 93]. The reason for digging into the cinders to those depths was to ascertain how deep the deleterious materials had penetrated into the cinders through leaching and otherwise. [Tr. 61].

In other words, he reached usable cinders. [Tr. 62]. The pits were hand excavated with a shovel and bar and were three to four feet in diameter, enabling him to stand at the bottom and shovel material out. [Tr. 93]. At that depth "the cinders were beginning to show quite clear." He stated that the cinders were well expanded with a membrane structure that would have strength [Tr. 72]. He tested the cinders by a procedure he described as the "bottle test" which involved agitation of the cinders in water to separate the foreign materials and this test yielded favorable results. [Tr. 73]. This was done the first year the claim was located. [Tr. 94]. He was sufficiently well satisfied with the results of his bottle tests and his knowledge of cinders that he felt "he didn't have anything to worry about" with regard to the quality of the cinders. [Tr. 95]. Harenberg also testified that he "dug small post hole pits on a good many places on that hill before I thought the hill was worthwhile to spend further monies and do further work." [Tr. 54]. In addition to these holes, Harenberg testified that in the summer of 1955 he opened a cut on the claim which exposed eight or nine feet of cinders, which indicated to him that there was sufficient quantity. [Tr. 68]. Whether this cut was made before July 23 is in some doubt, but Harenberg testified that he believed it was prior to that date. [Tr. 67]. Harenberg's reputation for truth and honesty is apparently well respected by the Forest Service personnel involved, as it is alluded to in the mineral examiner's report [Exh. No. 2], and in the Forest Service brief on appeal. The Judge accepted Harenberg's testimony as sufficient to establish that this cut was in fact made prior to July 23, 1955, and he so found in his decision. [Pg. 4]. The Forest Service offered no conflicting evidence as to the date the cut was opened.

Gilbert Matthews, a mining engineer employed by the Forest Service, testified that the claim is situated on a volcanic cone in an area of volcanic activity, in which volcanic cinders and scoria are quite widespread. [Tr. 20, Exh. 2]. He acknowledged that such cinders are much used for the kind of block manufacture in which Harenberg is engaged, and that such cinders are transported into Phoenix, Prescott, and other places for the manufacture of blocks. [Tr. 23].

Matthew's report of mineral examination [Exh. 2] states that the area is known as the San Francisco Volcanic Field, with San Francisco Mountain being the central source of quaternary igneous activity. Other small volcanoes surround San Francisco Mountain. Small volcanic cones are dispersed among and about these larger volcanoes. The hill embracing the subject claim, which lies five miles northeast of Humphreys Peak, the principal peak of San Francisco Mountain, is one of these lesser volcanic cones.

[Exh. No. 2]. In his testimony Matthews repeatedly referred to these as "cinder cones." [Tr. 33, 41, 43]. On the basis of the geologic conditions present Matthews concluded that there is a great abundance of cinders on the claim, as indicated by the following excerpts from the transcript of his testimony:

[Tr. 41]

Q. Can you tell if there is a significant tonnage of that type of material?

A. Oh, I would say that the whole cinder cone is.

* * * * *

[Tr. 42]

Q. Mr. Matthews, I am still discussing quantities now. What I am seeking to know is whether or not you can actually see this is something that goes to great depth in that cinder cone or whether these are superficial exposures which you assumed go to depth in that cinder cone?

A. Well, I am just assuming, but I can't – there was a vent I noticed on top. I think I show it on my plat. There was a sizeable – off to the west of the crater there is a lava cap up there. It is pretty dense, hard material. I measured it at 40-foot thickness, and I have no reason to believe that the cinder cone isn't cinder and scoria down through the basement rock of the permian type limestone.

* * * * *

Q. So then when you state that there is a significant quantity of this type of cinders, you are inferring, are you not that cone is primarily cinders on the inside?

A. Yes, just an inference I make. I would assume that around the crater in depth you might have a more fused material. The cinder is caused by eruption of material with gases, it expands, but the core I would think would be higher density material.

* * * * *

Urban Harenberg testified that he has had practical experience in exploring for, locating, extracting and utilizing such cinders over a period of several decades [Tr. 48]. He drew a diagram of

the geology of a cinder cone [Exh. A] and described the various products of volcanic eruption. [Tr. 49]. He described his examination of the hill in his effort to analyze its geologic structure. [Tr. 50, 54]. He conceded that he couldn't arrive at any conclusion as to how much cinder was actually on the claim, but he said the showings were good enough to warrant location. [Tr. 62]. He stated, "If I didn't feel that the chances was (sic) right in 1954, I wouldn't have located it." [Tr. 63].

The Department has refused to accept as a substitute for discovery deductions or opinions which are based solely on inferences drawn from known geological facts, regardless of how strong those inferences may be, where the actual ore body which is supposed to exist has not been exposed. United States v. Kenneth O. Watkins, et al., A-30659 (October 19, 1967), and cases cited therein. However, this is not to say that in order to show a discovery a mining claimant must prove conclusively that a particular mineral deposit which he has uncovered is valuable for mining. Geologic inference may be relied upon to establish the extent of potential value of a mineral deposit which has been physically exposed within the limits of the claim. Then the opinions of experts, based upon the geology in the area, the successful development of similar deposits, deductions from established facts, in short, all of the factors which the Department has refused to accept singly or in combination as constituting the equivalent of a discovery may be, and as a practical matter must be, accepted in determining whether a prudent man would be justified in the expenditure of his labor and means with a reasonable anticipation of developing a valuable mine. United States v. Kenneth O. Watkins, et al., *supra*.

Where, as in this instance, the claimant dug, in various places on the claim, six holes, three to four feet in diameter which penetrated the overburden and went into the cinders to a depth of 18 inches to two feet, where clean cinders were uncovered, and this was followed by the opening of a cut which exposed nine feet of cinders, the claimant was thereafter entitled to rely on the geologic circumstances to determine whether cinders existed on the claim in a mineable quantity. The fact that the claim was in a known area of volcanic activity which produced such cinders, and the further fact that the claim was actually on a volcanic cone of a type which characteristically is formed to a large extent by such cinders, will justify the claimant's assumption that the deposit he has uncovered exists in mineable size.

In its appeal the Forest Service contends that the red cinders which Harenberg found in 1954-55 were not what he was looking for and not what he was then utilizing, arguing that this type of cinder.

was not then of any value. Again we turn to the testimony to resolve this point.

[Tr. 63]

Judge: Well, in 1954, were you in a position – would you have been willing to start a mining operation on Harenberg No. 1?

Harenberg: If that was my only supply at the time and I was making colored blocks, yes.

* * * * *

[Tr. 68]

Judge: After [the red cinders] were exposed, was there sufficient exposure to start a mining operation or would you want to expose more before starting mining?

Harenberg: Well, it indicated that – of course, I wasn't looking for red cinders, but it did indicate that the cinders were there in sufficient quantity. Of course, I had explored all over in hand digging, see, and it looked favorable enough for me to continue. As a matter of fact, the reason I went up there is because my former work showed favorable.

Judge: You said, showed favorable enough for you to continue Continue what?

Harenberg: To develop a claim. In other words, it looked like it was something that was worthy to venture further on for the benefit of Harenberg Block Company in the manufacture of concrete block.

Judge: At the time, could you have gotten the cinders out of the claim?

Harenberg: Let me explain it this way. I had already started the block business. My demand for cinders was already there. If I had to, yes, I could have opened up that hill and taken out cinders.

[Tr. 69]

Judge: Well, then the question is why didn't you?

Harenberg: Because I was getting cinders from another source which to me was a temporary thing.

* * * * *

Judge: Did you in 1955 have a market where you could have used these pink cinders?

Harenberg: I did.

* * * * *

[Tr. 79]

Judge: Would you have been able to sell block made from the Harenberg No. 1 since 1955?

Harenberg: Oh, yes. Right.

Judge: Where would your market been at that time?

Harenberg: When we started the block business, it was a new product in Flagstaff. It was so new that people thought we had originated the idea, and wouldn't have mattered what the color of the block would have been, actually the demand would have been there. The mere fact that it had the natural color in it was just, you might say, a thing that appealed to people.

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[Tr. 99]

Judge: Perhaps I should ask you this question. Could you have made in 1955 cinder blocks from the Harenberg No. 1 cinder and sold it at a profit?

Harenberg: Yes. Right. We could have, very, very definitely.

No evidence was introduced by the Forest Service to show that the cinders could not have been profitably extracted and used by Harenberg in 1955.

The evidence of record shows that subsequent development of the Harenberg No. 1 is adequate to establish that the claim is presently valuable for the cinder deposit thereon. Considerable

work has been done, three grades of usable cinders have been found, there is a range of colors including red, buff, and black. The process of extraction had begun and the cinders from the claim had been utilized in the manufacture of block prior to the initiation of the contest. [Tr. 42, 63, 77].

We conclude that prior to July 23, 1955, a discovery of a valuable deposit of cinders was made on the Harenberg No. 1 mining claim and that said deposit is currently valuable.

The Harenbergs, in their appeal, maintained that the Judge wrongly limited them to 40 acres and that 80 should have been allowed. They do not point out any error in the rationale of the Judge's decision, but simply argue that 80 acres of the claim are valuable and needed by them. It may be that they do not yet understand the reason that the Judge held that the claim is valid as to only 40 acres.

The claim was originally located in 1954 as an association placer by eight persons. The co-locators quitclaimed their interest to the contestees on February 9, 1955. If a discovery had been effected prior to the conveyance, the entire 160-acre claim would have been valid and would have passed to the contestees. However, if no discovery then existed, the two Harenbergs could hold only a minimum of 40 acres in one association placer claim. A transferee of an association placer who makes a discovery after the transfer has a right to patent only 20 acres. United States ex rel., United States Borax Company v. Ickes, 98 F.2d 271 (D.C. Cir. 1938), cert. den., 305 U.S. 619 (1938). In this case the Judge did not regard the six pits excavated in 1954 as adequate to establish the fact of discovery. He held, in effect, that the opening of the cut in the summer of 1955, when added to the exposures in the six pits, did constitute a discovery, so that the discovery was effected after the co-locators had conveyed their interest to the contestees. He ruled, therefore, that 40 acres was the maximum that the two Harenbergs could hold under one claim. We agree.

The Forest Service, in its appeal, contends that the Judge's decision is interlocutory and challenges this Board's ability to render a final decision thereon, because the Judge's decision does not specify which 40 acres of the 160-acre claim the contestees are to receive. Once again we turn to the transcript to resolve this issue. On pages 101-102 is recorded a dialogue between counsel for the Forest Service and Urban Harenberg in which counsel requested Harenberg to identify the 40 acres he would take if the examiner limited him to no more than that. Harenberg very precisely identified two adjacent 20-acre parcels, which he drew in red pencil on

a plat of the claim, and which together comprise the NW 1/4 NE 1/4 of section 18, T. 23 N., R. 8 E., G. & S.R.M. No objection was raised by counsel. To the contrary, he seemingly acquiesced as indicated by the following colloquy:

Counsel: As soon as we go off the record I will ask Mr. Harenberg to put this same data on the attachment that is in a Exhibit 2.

Judge: All right.

Counsel: This is just an extra copy [of the plat].

Harenberg: I have proven more on those right there than any place else and they would be to me the most valuable.

The exhibit is now before us with the 40 acres marked off in red pencil, as it was before the Judge when he rendered his decision. No objection was ever raised to the awarding of this particular 40-acre tract and there was never any discussion that any different 40-acre tract would be recognized as the valid portion of the Harenberg No. 1 claim. We find no basis for doubt that it was intended that the portion of the claim which the Judge held to be valid is the portion described and discussed at the hearing and marked off on Exhibit 2 in red pencil, and we so hold.

One point requires further discussion. The Judge in his decision cited the decision in United States v. Ideal Cement Company, Inc., (June 25, 1970). That decision has since been vacated and the case remanded on reconsideration. United States v. Ideal Cement Company, Inc., 5 IBLA 235 (1972). However we do not find that action to bear on the disposition of this case.

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

Edward W. Stuebing, Member

We concur:

Frederick Fishman, Member

Anne Poindexter Lewis, Member

