

UNITED STATES  
v.  
ROBERT W. BEAL

IBLA 75-487

Decided February 4, 1976

Appeal from decision of Administrative Law Judge John R. Rampton, Jr., declaring appellant's lode mining claim null and void (Colorado Contest No. 454).

Affirmed as modified.

1. Administrative Procedure: Burden of Proof--Mining Claims:  
Contests--Mining Claims: Discovery: Generally

When the Government contests a mining claim, it has assumed the burden of presenting a prima facie case that the claim is invalid; when it has done so, the burden then devolves on the mining claimant to prove by a preponderance of the evidence that the claim is valid.

2. Mining Claims: Common Varieties of Minerals

The Act of July 23, 1955, excluded from mining location only common varieties of the materials enumerated in the Act, *i.e.*, "sand, stone, gravel, pumice, pumicite, or cinders;" therefore, a material must fall within one of those categories before the issue of whether it is a common variety becomes pertinent.

3. Mining Claims: Common Varieties of Minerals

Where a stone containing feldspar is simply ground into rock form and used for landscaping and building stone purposes for

which the feldspar element has no significance with respect to the stone's final use, the issue may properly arise as to whether the particular stone is a common variety which is excluded from mining location by the Act of July 23, 1955.

4. Mining Claims: Common Varieties of Minerals: Unique Property--Mining Claims: Common Varieties of Minerals: Special Value--Mining Claims: Determination of Validity

In order to prove that stone containing feldspar used for landscaping and building stone purposes is not a common variety of stone under the Act of July 23, 1955, a mining claimant must demonstrate that: (1) the mineral deposit has a unique property, and (2) the unique property gives the deposit a distinct and special value. In the event the mining claimant does not establish that these criteria are met, the Administrative Law Judge may properly hold that the stone cannot be classified as locatable under the mining laws because it is a common variety.

5. Mining Claims: Determination of Validity--Mining Claims: Locatability of Mineral: Generally--Mining Claims: Specific Mineral Involved: Feldspar

Ground feldspar, used as a soil conditioner or soil amendment, is not a locatable mineral deposit under the general mining laws in the absence of a showing that the mineral meets the test of United States v. Bunkowski, 5 IBLA 102, 113-16, 79 I.D. 43, 48-49 (1972), namely, that the mineral is found to be not just a physical amendment to the soil, but rather a chemical amendment which alters and improves soil or plant chemistry.

6. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

In order for a mining claim to be valid, there must be discovered within the limits

of the claim a valuable mineral deposit. A discovery exists 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 test, the prudent man rule, has been refined to require a showing that the mineral in question can be extracted, removed and presently marketed at a profit.

7. Mining Claims: Determination of Validity--Mining Claims:  
Discovery: Marketability

Where a mining claimant fails to submit adequate evidence as to the expected quantity and specifications of the local demand for industrial quality feldspar, does not receive any payment for inferior quality feldspar attempted to be sold for industrial use, and does not establish that the local market demand would justify the costs of developing a mill capable of processing industrial quality feldspar from the subject claim, the mining claimant has failed to satisfy the prudent man-marketability test which requires a showing that a reasonable prospect of success in developing a valuable mine exists. Where the anticipated costs and revenues of an alleged profitable mining operation are not based on reliable probative evidence, but only on mere speculation, a mining claim cannot be found valid.

APPEARANCES: John R. Moran, Jr., Esq., and John W. Coughlin, Esq., of Moran, Reidy & Voorhees, Denver, Colorado, for appellant; A. Walter Wise, Esq., Office of the General Counsel, United States Department of Agriculture, Denver, Colorado, for the Government.

OPINION BY ADMINISTRATIVE JUDGE RITVO

STATEMENT OF THE CASE

Robert W. Beal Has appealed from a decision by Administrative Law Judge John R. Rampton, Jr., dated March 26, 1975, declaring the

Dazie Bell lode mining claim to be null and void as a consequence of appellant's failure to rebut the government's prima facie case establishing the absence of a valuable, locatable mineral deposit on the subject claim.

The Dazie Bell claim was located by appellant's predecessor in interest in 1960 (Tr. 136) and is situated in the SW 1/4, sec. 2, T. 8 S., R. 70 W., 6th P.M., Jefferson County, Colorado, within the Pike National Forest. On March 28, 1969, at the request of the Forest Service, Department of Agriculture, the Bureau of Land Management filed an amended contest complaint (Colo. No. 454) charging that appellant's mining claim was invalid because: (a) no valuable mineral deposit had been discovered within the limits of the claim; (b) the land within the limits of the claim was nonmineral in character; (c) the claim was not being held in good faith for mining purposes; and (d) the claim was located in the 1960's for common varieties of stone which were no longer locatable under the mining laws following passage of section 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1970).

Following appellant's answer to the complaint, a prehearing conference was held on May 25, 1971, in Denver, Colorado. In accordance with the agreements reached by the parties, the Administrative Law Judge issued a "PREHEARING CONFERENCE ORDER" dated June 4, 1971, which stated in part the following:

4. The valuable minerals claimed to have been mined and which Contestee expects to mine from the claim are:

- a. Feldspar
- b. Fluorspar
- c. Rare Earth minerals, \* \* \*
- d. White milky quartz and quartz crystals

5. The following minerals are found upon the Dazie Bell lode mining claim:

- a. Fluorspar
- b. Feldspar
- c. Quartz

At the hearing, Contestee will furnish evidence of production and sale of the above minerals with dates, kinds and amounts.

\* \* \* \* \*

7. A quantity of Feldspar which would meet the specifications of a feldspar grinding mill exists on the claim.

Thereafter, a hearing on the matter was held on September 15-16, 1971, in Denver, Colorado. At the hearing, the following evidence was presented. Robert Gnam was called as an expert witness on behalf of the contestant. Gnam is a mineral examiner employed by the Forest Service. He testified that he examined the claim on several occasions (Tr. 24, 54); there are a number of pits on the claim which intrude into what is probably one pegmatite body (Tr. 51, 70); the pegmatite body contains a large quantity of iron stained quartz (Tr. 36), a limited quantity of potash feldspar (Tr. 36, 69-71), and small pods of fluorspar valuable as a byproduct mineral (Tr. 32-33, 38, 80, 217); there was no evidence of the presence of rare earth minerals and, in any case, their existence would only be valuable as a byproduct in the production of other minerals (Tr. 88-90, 108, 112, 115); there is some good quality feldspar which would be acceptable at a feldspar mill (Tr. 36-37, 70), which when properly ground and beneficiated could be used in the manufacture of glass and ceramics (Tr. 15, 118); two samples of fluorspar were taken (Tr. 75), and the results showed highgrade fluorspar in excess of metallurgical grade and close to or above acid-chemical grade (Ex. 22, Tr. 78-79); the claim has not been exhausted for feldspar and quartz (Tr. 75); quartz and feldspar are stockpiled on the claim (Tr. 34); appellant's predecessors in interest informed Gnam that no feldspar had been sold from any claims in the district, including the subject claim, after the feldspar mill in Denver closed in the late 1950's (Tr. 32-33, 217, 218); the Denver mill closed because the equipment was obsolete and the plant could not compete with newer mills (Tr. 218); and large tonnages of quartz had been removed from the claim for landscaping purposes (Tr. 30, 32).

The following colloquy then occurred:

Q. And now Mr. Gnam, I am going to ask you, based on your educational qualifications, your background, your experience and your examination of these claims in particular the pits and other information that you have gathered, whether or not in your judgment or whether you have an opinion as to whether a reasonably prudent man could be expected by the expenditure of further time and effort to produce a paying mine?

A. No, I do not think so.

Q. Will you please state briefly, your reasons for reaching that conclusion?

A. Yes, the predominant minerals exposed in the workings in the Dazie Bell are feldspar and quartz and feldspar, meaning in this case, a potash type feldspar.

The feldspar used in industry is generally processed and ground to a fine size for use in the glass industry and in ceramics. There is no market for feldspar that I can determine in the local area. The nearest place that might purchase raw feldspar would be Custer, South Dakota. This is about 400 miles from the claim and the price for raw feldspar at the mill is \$7.00 per ton delivered at the grinding plant and to me it is obvious you can't ship raw feldspar that distance with any reasonable chance of making a profit.

Then, if the feldspar is to be used for ornamental purposes then I would think it would be a common variety, because it is used in building or in ornamental stones and wouldn't constitute a locatable mineral on that basis. This would hold for quartz pretty well too. The quartz used for ornamental and landscaping purposes would constitute a common variety and not locatable under the mining law.

\* \* \* \* \*

Then, if you can't mine quartz and feldspar economically the mineral, fluorspar or fluorite and any occurrences of the rare earth minerals that might come in associated with fluorite or in the biotite minerals, these would merely be by-products of the mining of the feldspar and quartz so they have no economic significance really, unless you can mine all of it together. And there are such few and scattered occurrences of the feldspar or the fluorspar deposits that I have described, very minute in relation to the other massive minerals in this deposit.

\* \* \* \* \*

Q. So what you have in effect, with your working background, you have concluded that the Prudent Man Rule, for ease we will refer to it as that, would preclude one from developing this property because of the absence of what you call a market for feldspar, is that correct?

A. That would be part of it, yes. Because if there is no market, no prudent man would try to sell it.

(Tr. 67-69).

Gnam further testified that he had researched the available market information for feldspar and fluorspar (Tr. 100) with reference to market prices (Tr. 21, 99), costs of development such as drilling, blasting, sorting, loading, transport, and labor (Tr. 71, 116), and concluded that no local market existed for the raw feldspar from the subject claim (Tr. 101), since the closest active feldspar grinding mill was located at Custer, South Dakota (Tr. 117).

On cross-examination, Gnam stated that, assuming there was a nearby mill capable of processing raw feldspar, one would have something more than a mere hope that the exposed feldspar mineral on the claim would be valuable (Tr. 110-112). He added, however, that this was mere speculation because while "there is a market for ground feldspar in the area, \* \* \* we are speaking of raw materials. Once it is ground, then it is beneficiated to a different product. We are speaking of raw feldspar in this area and I know of no market other than what I have discussed here" (Tr. 118). He stated that the best test for determining whether the minerals on the claim were a valuable deposit would be a demonstration by the contestee that the feldspar could be marketed at a profit (Tr. 84). Gnam added that he knew that the contestee owned a small crusher and steel ball mill in Cristola, Colorado, but stated that the mill could not be used for production of industrial quality ground feldspar (Tr. 131-32).

At the close of Gnam's testimony, contestee moved to dismiss the case on the grounds that the Government failed to establish a prima facie case (Tr. 149). The Administrative Law Judge responded as follows:

I am going to deny the motion. \* \* \* [I]f it were based on quality and quantity alone, I would grant the motion. \* \* \* Gnam appeared to be basing his opinion mostly on the grounds that there is no market and therefore, did not have to make any further determination. And that's why the case, as to quality and quantity was not established, possibly because it was felt there was no need to. That's the way I understand the case and that's why I am going to deny the motion, solely on the basis of market.

(Tr. 159-60).

The contestee was then called to testify and stated that there was a local market demand for ground feldspar (Tr. 166); he owned a crushing and screening plant and a small steel ball mill in Cristola, 45 miles from the subject claim (Tr. 161); he could take feldspar from his claim and process it in his mill for use in the

Columbine Glass Works Company in Golden, Colorado, which presently receives its supply from Wyoming (Tr. 162); and he could supply the Denver Fire Clay Company in Canon City, Colorado, a ceramics plant, which presently acquires its ground feldspar from South Dakota (Tr. 163); he did not know of any other local markets in the area for ground feldspar (Tr. 162); his mill had a 25 ton per day processing capacity (Tr. 162); and he expected to get at least the going rate for quality ground feldspar of \$40 per ton delivered to the plant (Tr. 166).

On cross-examination, Beal testified that he had ground a one-half ton test-lot of feldspar in his mill but had never marketed the product (Tr. 169); he had not ascertained the quantity, price or specifications for the ground feldspar required by the above companies (Tr. 173-76); the companies generally informed him that should he have sufficient raw feldspar and a plant capable of processing material meeting glass and ceramic specifications, he could break into the market (Tr. 177). At this juncture, the hearing was adjourned.

On the following day Beal was recalled and testified that in the interim period he had contacted the Denver Fire Clay Company and was told that it paid \$48 per ton for quality ground feldspar, 200 mesh, FOB Canon City (Tr. 184). He had not inquired as to the company's current quality specifications or quantity requirements (Tr. 184). He further testified that he had discovered that the Columbine Glass Works Company was no longer in the market for ground feldspar (Tr. 185). Beal also stated that the C. F. & I. Steel Corporation of Pueblo, Colorado, was in the market for metallurgical grade fluorspar (Ex. C, Tr. 186-87).

In its case on rebuttal, the Government recalled Gnam who testified that the contestee's mill was incapable of producing quality ground feldspar because it had steel liners and steel balls which, in the grinding process, would add considerably to the iron content of the feldspar. This would make the material unacceptable in glass and ceramic industries because iron oxidation would lead to discoloration and staining (Tr. 197-200). Gnam stated that the various feldspar mills he had seen, such as the one in Custer, South Dakota, used expensive flint liners and special pebbles normally imported from Belgium or France, in order to prevent iron contamination of the feldspar (Tr. 198-99). Processing requires putting the feldspar through a primary crusher, then a cone crusher, then through the pebble mill, and also through magnetic separators and air cyclones in order to remove any deleterious iron material. Finally the material is screened. He concluded that, "a feldspar mill costs upward from half a million dollars on up \* \* \*" (Tr. 198).

Gnam further testified that the Columbine Glass Works Company no longer desired feldspar because it was committed to buying from its supplier (Tr. 203, 214); but the Coors porcelain plant in Colorado was presently using 120 tons of ground feldspar a year, 200 mesh, with the following specifications: iron content, .09%; potash content, 10.4%; sodium, 3.2%; calcium oxide, .1%; aluminum oxide, 17.5%; and silica dioxide, 68.5% (Tr. 203). Gnam did not know whether ground feldspar from contestee's claim could meet these specifications (Tr. 214). He also testified that he had talked with officials at the C. F. & I. Steel Corporation and they indicated that they were not interested in buying small quantities of fluorspar on a sporadic basis, but required assurance of sufficient quantities and uniform quality (Tr. 209). Gnam reiterated that contestee's claim could not sustain an economic operation on fluorspar production alone (Tr. 211).

At the close of the testimony, the Administrative Law Judge suggested that the parties might consider agreeing to a test in which the contestee would attempt to process and market the feldspar from the claim (Tr. 222). Counsel for the Government argued that the contestee had already had a sufficient opportunity to develop the claim but had failed to do so, and objected to leaving the proceeding open (Tr. 225). Counsel for the contestee submitted that if given the opportunity, Beal would be capable of marketing the feldspar from the claim (Tr. 226). The contestee then renewed its motion to dismiss (Tr. 238), which was denied by the Judge pending an opportunity for adequate review of the record (Tr. 240).

In his posthearing briefs, contestee restated his willingness to submit to the challenge of actually marketing the feldspar. He also noted that, in any case, under applicable rulings of the Department, a mineral claimant is not required to be actually engaged in a profitable mining operation, as there need only be a possibility of profit sufficient to attract reasonable men towards expending their means with a reasonable prospect of success in developing a valuable mine. Appellant pointed out that despite the prehearing order requiring submission of marketing documentation, the Administrative Law Judge had noted that evidence of production and past sales was but a facet of marketability and that the marketability test could be satisfied without such evidence (Tr. 14).

Appellant concluded that the Government had failed to sustain a prima facie case as to the absence of a sufficient quantity and quality of locatable minerals on the claim, and that the Government's only viable argument against the validity of the Dazie Bell claim was the contention that no market existed for the minerals. Appellant maintained that he preponderated on the marketability issue by establishing a potential demand for his product from the

Denver Fire Clay Company and the C. F. & I. Company. <sup>1/</sup> By reason of the alleged preponderance of evidence in his favor, appellant requested that a determination be made that the subject claim was supported by the discovery of a valuable mineral deposit and was, therefore, a valid claim.

The Government, in its posthearing briefs, maintained that contrary to the Administrative Law Judge's preliminary finding, the contestant's evidence of insufficient quantity of mineral on the claim had gone un rebutted by the contestee. Furthermore, the Government urged that appellant's marketability arguments were speculative since Gnam had indicated that the C. F. & I. Company was not interested in purchasing fluorspar (a byproduct of feldspar production) in small quantities, and that Denver Fire Clay's potential as a market had not been established, *i.e.*, no evidence was presented as to the amount of prospective purchases, specification requirements, costs of production and beneficiation, transportation costs, etc., which would indicate whether such sales to this market could be made at a profit. In addition, the Government argued that contestee did not have a mill capable of producing a marketable quality of ground feldspar. The Government concluded that the contestant had presented a prima facie case on the invalidity of the subject claim which appellant failed to rebut by a preponderance of the evidence. Accordingly, the contestant requested that the claim be declared null and void.

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<sup>1/</sup> The contestee appended an affidavit and two exhibits to his posthearing brief. The affiant-contestee swore that subsequent to the hearing he had marketed 1,000 pounds of ground feldspar and 500 pounds of ground fluorspar to the Pikes Peak Glass Manufacturing Company, Colorado Springs, Colorado, and received the equivalent of \$50 per ton for the feldspar and \$65 per ton for the fluorspar. He also stated that he had ascertained that there existed a local market for ground potassium feldspar for use as a soil conditioner. Exhibit "A" was a letter from the Pikes Peak Company indicating that the iron content in the shipped material was too high; exhibit "B" was a letter from Castle Clay Products, Inc., Denver, Colorado, stating that, in the future, it would be in the market for ceramic quality ground feldspar. In its reply brief, the Government urged that these attachments were inadmissible as the record made at the hearing must be the sole basis for the Judge's decision. While evidence tendered after a hearing in a contest against a mining claim cannot be used in rendering a decision, such evidence can be used to determine whether the hearing should be reopened. *Cf. United States v. Kottinger*, 14 IBLA 10 (1973). The Judge did not render a decision, but did reopen the hearing. See discussion *infra*. Therefore, we find no error.

By "ORDER" dated November 7, 1972, the Administrative Law Judge, after reviewing Gnam's testimony, stated the following:

At this point, based upon the testimony of Mr. Gnam and the stipulation entered into between the parties, a preliminary finding is made that there does exist upon the claim in issue a quantity of feldspar amenable to mining with intermittent pods of high grade fluorspar. Mr. Gnam also recognized that feldspar was a locatable mineral and not a common variety \* \* \*.

On the question of discovery, it would appear at this point that the only facet left to explore would be the question of the marketability of the deposit. In this situation, we have a mineral of known quality and of presumably sufficient quantity to sell if there is a market. \* \* \*

\* \* \* \* \*

Ruling

From a review of the evidence and the briefs submitted by the parties, it appears that the validity of the claim rests upon the simple proposition that the contestee either can or cannot process the material from the claim into a salable product at a profit. The best way to determine this question would be by actual tests.

I fully realize that such a task would take months to complete. Nevertheless, to insure a just result, sufficient evidence should be made available so that the trier of fact need place minimal reliance upon expert opinion interpretive in nature. Further, the land embraced within the claim is still open to mining location. To declare the claim void on the evidence available would be a useless gesture.

I hereby order that the record in this case be reopened. The contestee is allowed until June 30, 1973, in which to attempt to mine, mill and market ore from the claim and to furnish to the contestant pertinent data on the results of the tests. The parties will confer and attempt to arrive at a stipulation of facts for the record on or before July 31, 1973. If no stipulations are reached or if further testimony is required, a rehearing will be held in Denver, Colorado,

in August 1973, on a date and at a place to be determined.

The Judge, thereafter, permitted an extension of time until September 15, 1973, to permit compliance with his order. During this period the parties attempted to stipulate to certain facts in an effort to make reopening the hearing unnecessary, but no agreement could be reached. On February 11, 1974, the Forest Service filed a motion with the Judge to reopen the hearing alleging that the contestee had altered the basis upon which he asserted rights under the mining laws for the contested claim.

A hearing was held in Colorado Springs, Colorado, on June 27, 1974. Beal was called to testify and stated that he had milled and marketed feldspar to the Pike's Peak Glass Manufacturing Company (II Tr. 37, see footnote 1); he sold one ton of ground feldspar for use as a soil conditioner (II Tr. 62); and he sold an abundant amount of quartz and feldspar for uses such as planter bedding, exposed aggregate, and landscaping material (II Tr. 63-65, Ex. F). The average price received for the material sold was \$130 per ton (II Tr. 67, Ex. F). He stated that the Columbine Glass Works Company indicated to him that it now had a present demand for quality ground feldspar (II Tr. 103, 105), and the Denver Fire Clay Company market was still open (II Tr. 138). When asked why he had not developed his claim for the glass and ceramic markets, he responded as follows:

A. I am selling this material, as I told you, for \$130 a ton that they call common variety markets, where I was offered fifty dollars a ton at the Denver Fire Clay for ground two hundred mesh feldspar. \* \* \*

[A] prudent man would never sell something down the street for fifty dollars when he can sell it here at home for a hundred and fifty. \* \* \*

Q. What you're saying, you made a choice of where to sell your specific product because you can get a better price?

A. A better price, and I'm able to produce that at the present time without a great deal of expense. I can produce feldspar for Coors, for Denver Fire Clay if I want to put in a pebble mill. And my ball mill is inferior, I've admitted that. \* \* \* I can put in a pebble mill if I wanted to grind feldspar \* \* \*.

(II Tr. 106-08). As for his sale to Pikes Peak Glass, the contestee testified as follows:

A. There's one small shipment of very crude material that wasn't even good over at this little Pikes Peak Glass Company. \* \* \* I didn't even charge the guy. \* \* \* I gave him an inferior product. \* \* \* I said I would sell it to him, but if it's not good enough for you, I won't even charge you. He bought it from me, but it was an inferior product. \* \* \* [H]e said, "Bob, that's rough stuff. I've got too much iron."  
\* \* \*

\* \* \* And he will buy the material. All I got to do is clean it up. The material's fine. \* \* \*

Q. But that would take some additional equipment, I think you said.

A. Yes, it would take a pebble mill, as Mr. Gnam described. \* \* \*

(II Tr. 127-28).

Contestee added that someone had informed him that he could adequately process his feldspar for industrial use by investing in a "stone crusher" costing \$4,000, instead of going to all the expense indicated by Gnam (II Tr. 128, 129, 139-40). Beal added that he did not wish to make any additional investment until he was assured that the claim was valid (II Tr. 140). Finally, he testified that he had stopped selling his ground feldspar as soil conditioner because, "I didn't know it was illegal. I got to thinking maybe it's not beneficial. I didn't take assays through the proper channels" (II Tr. 131).

Gnam was called to testify and stated that he had taken a sample of pulverized feldspar from the claim and had it analyzed by the Colorado Department of Agriculture, Division of Inspection and Consumer Services (II Tr. 144). That Division issued an "Official Fertilizer Report" which had the following concluding remark:

This sample appears to have about 6% Calcium and Magnesium Carbonate. The rest is feldspar. \* \* \*  
(Ex. 29.)

In his decision dated March 26, 1975, the Judge found that the evidence presented at the two hearings was sufficient to establish that the material from the claim could be mined and

marketed at a profit for use as soil conditioner and for landscaping and building material (Dec. at 6). He also found that there was no evidence in the record indicating that the material from the claim had any properties which gave it value for purposes for which ordinary varieties of "stone" are not suited; nor was evidence presented to show that the material had distinct and special qualities which would command a higher price than "ordinary crushed stone or quartzite" (Dec. at 7). He then concluded the following:

Thus, under the decisions cited [McClarty v. Secretary of the Interior, 408 F.2d 907 (9th Cir. 1969); United States v. Bunkowski, 5 IBLA 102, 79 I.D. 43 (1972); United States v. U.S. Minerals Development Corp., 75 I.D. 127 (1968)] it is immaterial whether a portion of the material upon the claim consists of deposits of feldspar and fluorspar, which may be classified as an uncommon variety for use within the ceramic industry, if the purposes for which the material sold is for the same purposes as minerals of common occurrence. If the dominant use for which the contestee has a reasonable prospect of success is for the building industry and for use as a soil conditioner, the material cannot be classified as locatable under the mining laws because it is a common variety (Dec. at 8).

With respect to the industrial market for feldspar, the Judge found that the material as processed by the contestee was of insufficient quality for use in this market, was sold for no charge, and the contestee's demonstration had thus failed to meet the conditions imposed in the Judge's previous order (Dec. at 11). The Judge was also dissatisfied with the contestee's excuses for not investing the \$4,000 expenditure alleged to be sufficient to provide for a plant which could process quality ground feldspar material (Dec. at 11). He then concluded that the contestee had failed to rebut the prima facie case presented by the contestant that there was no valuable deposit of fluorspar and feldspar on the subject claim that could be mined and milled at a profit. Accordingly, he declared the claim to be null and void (Dec. at 11).

Appellant's statement of reasons on appeal, and the Government's answering brief, present factual allegations which are clear. However, the legal bases for their proposed requests for relief, particularly with respect to the "common variety" issue, require some discussion. The appellant maintains, first of all, that a sufficient quantity and quality of feldspar material has been demonstrated to exist on the claim. He next argues that the Judge's conclusion respecting the common variety nature of the feldspar was incorrect because the Judge had previously ruled in his Order of November 7, 1972, that:

Gnam also recognized that feldspar was a locatable mineral and not a common variety \* \* \*.

Appellant further argues that:

\* \* \* use of the mineral is only one factor in determining the issue of common variety \* \* \* [and] there has been shown more than a reasonable prospect for success in selling the mineral from the Dazie Bell in the glass and ceramics industries, regardless of sales in the building industry or as a soil conditioner. (Brief at 4.)

Appellant then adds that the feldspar from the Dazie Bell, used for ceramics and glassware, "has distinct and special qualities which make it an uncommon variety mineral."

Appellant finally argues that the Administrative Law Judge was in error because he demanded that the appellant "must demonstrate marketability conclusively." Appellant maintains that such a requirement is contrary to well established law which holds that a mining claimant is not required to prove a discovery by showing that he is actually engaged in a profitable mining operation, but may merely show a reasonable prospect of success. Appellant concludes that he has satisfied this test by demonstrating the existence of a local market for industrial quality ground feldspar.

The Government urges that the Judge's findings are erroneous insofar as they apply to the sufficiency of the quality and quantity of the mineralization of the claim. Next the Government states that:

The vast majority of the claimant's proof of marketability is devoted to the use of feldspar for common variety purposes, specifically as landscaping material. The record is devoid of evidence that feldspar used for ornamental or landscaping purposes has any unique property not possessed by other commonly occurring substitutes, nor is any distinct or special value ascribed to the feldspar in its use as a landscaping material.

The claimant alleges the sale of one ton of ground feldspar as a soil conditioner. There is no indication in the record that the feldspar possesses any unique property making it particularly suited for this purpose nor that it commands a premium price in the marketplace. In an analogous situation, this Board found gypsite used as a soil conditioner or soil amendment nonlocatable. United States v. Bunkowski, 5 IBLA 102 (1972). [2/]

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2/ This statement is incorrect. See discussion infra.

The Government submits that feldspar is not locatable when used for landscaping purposes or as a soil conditioner. United States v. Minerals Development Corporation, 75 I.D. 127 (1968); United States v. Toole, 224 F. Supp. 440 (D. Mont. 1963); United States v. McClarty, 17 IBLA 20 (1974). If a deposit is found to be nonlocatable, no showing of marketability, regardless of magnitude, can breathe life into the claim, since only those minerals open to location under the general mining laws can serve as a basis for establishing a valid mining claim. Therefore, this Board should disregard any evidence of marketability predicated upon sales of common variety feldspar. (Brief at 4-5.)

As for the claimant's alleged ability to exploit the feldspar in the glass and ceramic industry markets, the Government argues that the evidence presented by the claimant was speculative and the appellant failed to prove the feasibility of his proposed operations in this area. In addition, the Government points out that it does not dispute appellant's contention that an existing profitable mining operation need not be conclusively demonstrated in order to satisfy the marketability test for discovery, and argues that the Judge did not impose such a requirement. The Government contends that the Judge determined that the appellant had failed to establish a reasonable prospect of success of developing a profitable industrial feldspar operation on the claim.

In response to the Government's answering brief, appellant has requested an opportunity for a hearing to prove the existence of: (a) the sufficiency of the quantity and quality of the mineralization on the claim; (b) the unique, distinct and special values attributable to the feldspar in its use as a soil conditioner and landscaping material; and (c) the cost feasibility of marketing the material from the claim.

#### LEGAL ANALYSIS

[1] To begin with, we note that when the Government contests a mining claim, it has assumed the burden of presenting a prima facie case that the claim is invalid. When it has done so, the burden then devolves on the mining claimant to prove by a preponderance of the evidence that the claim is valid. United States v. Zweifel, 508 F.2d 1150, 1157 (10th Cir. 1975); United States v. Springer, 491 F.2d 239, 242 (9th Cir.), cert. denied, 419 U.S. 234 (1974); Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959). With this in mind, we now turn to the substantive problems in the record.

[2] In order to simplify the analysis necessary to decide this case, we turn to the methodology set forth in United States v.

Pierce, 75 I.D. 270 (1968). In the Pierce case, some of the claims in dispute contained feldspar capable of being mined, processed and sold in the glass and ceramic industry, but the appellant failed to satisfy the marketability requirement for a valid discovery. There was confusion in that record regarding whether the mineral deposits on the claims were to be considered "common varieties." The Department handled the problem as follows (supra at 279):

We are faced then with a series of questions. First, do the deposits \* \* \* constitute common varieties of minerals? \* \* \* If the minerals on the claims \* \* \* are not common varieties, the inquiry turns to whether they are marketable at a profit as of the present time. If they are not, the claims must be declared invalid.

The first issue is whether the deposits are "common varieties" within the meaning of the Act of July 23, 1955. Section 3 of that act, as amended, 30 U.S.C. sec. 611 (1964), provides that:

No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: \* \* \*. "Common varieties" as used in this Act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value \* \* \*.

At the outset it is to be noted that the statute does not apply to common varieties of all minerals but only to common varieties of those enumerated, namely, "sand, stone, gravel, pumice, pumicite, or cinders." Some of these terms, e.g., sand, gravel, and stone, are broad in meaning and can encompass a wide range of materials. The term "stone," in particular, is extremely broad in meaning, including material of igneous, sedimentary, or metamorphic origin and material of variegated mineral composition, ranging, for example, from white limestone to dark basalt. This being the case, it is important not to confuse the material with the constituent elements that make it up. That is, in determining whether a particular material falls within the purview of the common varieties provision, it is necessary to determine whether

the material as a totality has value or whether only a constituent element of the material has value. (Emphasis added.)

The appellant in the present case has alleged three markets for the materials on his claim, namely (a) landscaping and building stone, (b) soil conditioner, and (c) glass and ceramic industry. We will examine each of the alleged markets in order to determine whether the validity of the Dazie Bell claim has been established.

[3] For its use as landscaping and building stone, the feldspar on the subject claim (as well as the quartz) is simply ground into rock form and the feldspar element in the final product is of no significance. As the Judge pointed out, when used for this market the material is no different from "ordinary crushed stone or quartzite" (Dec. at 7). Under these circumstances, the feldspar was properly considered to be a "stone" within the meaning of the common varieties provision. United States v. Pierce, *supra* at 280.

[4] Appellant's claim was located in 1960. Accordingly, the only way he can avoid the withdrawal effect of section 3 of the Act of July 23, 1955, is to establish that the "stone" on his claim is valuable because the deposit has some property giving it a distinct and special value. United States v. McClarty, *supra*; United States v. U.S. Minerals Development Corp., *supra*. We find that the Government is correct in its assessment that the record is devoid of evidence that would indicate that stone containing feldspar (or quartz) from the claim used for landscaping or building stone purposes has a unique property which gives the stone a distinct and special value. Accordingly, we hold that the Judge properly determined that this stone is a common variety and is not locatable under the mining laws.

[5] We next come to the use of the feldspar as a soil conditioner. The Judge held that the feldspar was not locatable for this purpose because it was, again, a common variety material. The Government submits that feldspar is not locatable when used as a soil conditioner, and points out that there is no evidence demonstrating that feldspar used for this purpose has a unique property which gives the material a distinct and special value. Appellant requests a hearing in order to demonstrate the unique, distinct and special values attributable to the feldspar in its use as a soil conditioner.

Appellant has claimed that finely-ground feldspar from the claim is valuable as a soil conditioner. In this situation the value asserted for the claim is not for the feldspar as a "stone." Accordingly, the issue is not whether the feldspar used as a soil conditioner is or is not a common variety within the meaning of section 3 of the Act of July 23, 1955. A mineral used as a soil

conditioner may be locatable under the general mining law if its addition to the soil results in a beneficial chemical change, but not if the change is only physical, i.e., improves friability. United States v. Bunkowski, supra. If the feldspar is chemically beneficial and valuable as a soil conditioner, the feldspar material would constitute a locatable mineral deposit under the general mining laws. United States v. Robinson, 21 IBLA 363, 82 I.D. 414 (1975); United States v. Bunkowski, supra; see also United States v. Toole, supra.

In United States v. Robinson, supra at 383, 82 I.D. at 423, the Board discussed the issue as follows:

The Department has held that not all materials that can be removed from the earth and sold at a profit are locatable under the mining laws. More specifically, mineral materials suitable for base, fill or comparable uses requiring material of no particular specifications and involving only the transportation of the material from one location to another is not locatable, and even if the material is suitable for other purposes, sales of the material for non-validating uses cannot be considered in determining marketability. United States v. Bienick, [14 IBLA 290, 293, 298 (1974)]; United States v. Harenberg, 11 IBLA 153 (1973); United States v. Barrows, 76 I.D. 299, 306 (1969), aff'd, Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971); United States v. Hinde, A-30634 (July 9, 1968). \* \* \*

\* \* \* \* \*

In Bunkowski, the Board adopted the Bureau of Land Management's ruling that the gypsite was locatable as an agricultural soil amendment because it was not only a physical amendment, altering friability, but a chemical amendment, combining with and removing sodium to improve alkaline soils. The gypsite was thus distinguished from other "minerals" such as rhyolite and blow sand, which only served as physical amendments to soil and have been held nonlocatable for such use. United States v. Story, Idaho C-010171 (August 17, 1960) (rhyolite); United States v. Jaramillo, A-28533 (February 6, 1961); Solicitor's Opinion, M-36295 (August 1, 1955) (blow sand). [Footnote omitted.]

With these principles in mind, we now consider the relevant evidence concerning the feldspar's use as a soil conditioner. Appellant testified that he had sold one ton of ground feldspar for use as a soil conditioner (II Tr. 62). In its answering brief, the

Government states that under Colorado's Commercial Fertilizer and Soil Conditioner Act of 1971, a fertilizer material is described as one which:

Contains stipulated quantities required by regulation of the essential plant nutrients, nitrogen, phosphorous, potassium, calcium, magnesium, sulphur, boron, chlorine, copper, iron, manganese, molybdenum, and zinc.

A soil conditioner or soil amendment describes:

\* \* \* a substance, defined by regulation, other than a commercial fertilizer, intended to improve chemical or physical characteristics of the soil \* \* \*. (Brief at 11.)

A substance sold for either of these purposes must be registered and tested by the State in order to assure quality compliance.

At the second hearing the Government presented the State's inspection analysis (Ex. 29) which indicated that the feldspar sample did not have chemical qualities which would permit classification of the material as a fertilizer or soil amendment. This evidence went unrebutted by appellant; in fact he added that, "I got to thinking maybe it's not beneficial. I didn't take assays through the proper channels" (II Tr. 131). In view of this evidence we find that the Government established that the feldspar on the claim used as a soil conditioner did not satisfy the Bunkowski test, and was therefore not a locatable mineral deposit. Accordingly, while the Judge held that the soil conditioner material was nonlocatable because it was a common variety, we affirm his conclusion as modified by our discussion above.

Finally we come to the issue of whether the validity of the Dazie Bell claim was established with respect to feldspar use in the glass and ceramics industries. Again we are not dealing with feldspar used in the general sense of a "stone" and, therefore, the common variety issue is not relevant. We are concerned here with a mineral which is locatable under the general mining laws of the United States. 30 U.S.C. § 21 et seq. (1970).

[6] The locatability of a mineral, however, is only the first step in determining the validity of a mining claim. In order for a mining claim to be valid there must be discovered within the limits of the claim a valuable mineral deposit. A discovery exists:

\* \* \* [w]here 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 \* \* \*.

Castle v. Womble, 19 L.D. 455, 457 (1894). This test, the prudent man rule, has been refined to require a showing that the mineral in question can be extracted, removed and presently marketed at a profit, the so-called marketability test. United States v. Coleman, 390 U.S. 599, 602 (1968).

[7] Appellant was given ample opportunity to establish the potential marketability of the feldspar for industrial use. However, over the course of two hearings, appellant failed to submit adequate evidence as to the expected extent and specifications of local demand. Furthermore, he has processed material which did not meet industrial specifications and he received no payment for the processed material. Most importantly, he did not establish that the local market demand would justify the cost of developing a mill capable of processing industrial quality feldspar.

We find that the most reliable evidence as to mill development costs was presented by Gnam who was familiar with the old mill that closed in Denver and who had seen operating mills such as the one in Custer, South Dakota. The appellant agreed with Gnam as to the type of mill needed. His testimony as to the possibility of using a less expensive process (II Tr. 131), is so indirect and unsupported as to be of no probative value (II Tr. 128, 129, 139-140). According to Gnam the capital investment necessary to enter the alleged market could require in excess of \$500,000. As this Board recently stated in United States v. Clark, 18 IBLA 368, 373-74 (1975):

To comply with the prudent man test the Department requires that a claimant show the probable costs and revenues of his proposed mining operation. While the Department has never required "a sure thing," it does at least require that the method of mining seem plausible and that the anticipated costs and revenues appear reasonable. \* \* \* [W]here the anticipated costs and revenues are not based on reliable probative evidence, a mining claim cannot be found valid.

Upon review of the record, it is our conclusion that Beal based his opinion of the economic feasibility of marketing feldspar for industrial use on assumptions which were not supported by the evidence. The prudent man-marketability test requires a showing that a reasonable prospect of success in developing a valuable mine exists. While there is room for consideration of future probabilities within this test, these probabilities cannot be based upon mere speculation. The crucial question to ask is whether, based on presently known facts, there is a reasonable prospect of success. United States v. Heldman, 14 IBLA 1, 8 (1973); Castle v. Womble, supra at 475. In the present case, appellant has failed to demonstrate a reasonable prospect of successfully exploiting the feldspar for industrial use.

Furthermore, we reject appellant's argument that the Judge applied an improper test requiring that marketability be conclusively demonstrated. The Judge was well aware that marketability in fact need not be established (Tr. 14). Implicit in the Judge's initial order was the finding that appellant had failed to establish a "reasonable prospect of success," but nevertheless, the Judge determined that appellant should be given an additional opportunity to establish the validity of his claim based on the assertion "by Mr. Beal that he had a suitable grinding and crushing plant capable of producing marketable feldspar in the glass and ceramics industry" (Dec. at 6). Accordingly, appellant neither proved a reasonable prospect of success nor a present ability in fact regarding profitable marketing of the feldspar for industrial use. Since appellant failed to rebut the Government's prima facie case of invalidity based on nonmarketability, his claim was properly declared invalid.

The appellant has had sufficient opportunities to establish the validity of his claim, and in view of the earlier objections of the Forest Service regarding continuing these proceedings, we do not believe that a further hearing is warranted in this case. Therefore, appellant's request for a hearing is denied. 43 CFR 4.415; United States v. Stevens, supra.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision below is affirmed as modified by our discussion above.

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Martin Ritvo  
Administrative Judge

We concur:

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Joan B. Thompson  
Administrative Judge

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Anne Poindexter Lewis  
Administrative Judge

