

UNITED STATES
v.
MAMIE VAUGHN ET AL.

IBLA 80-30

Decided July 24, 1981

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer dismissing Government contest complaint. WY 31195.

Affirmed.

1. Mining Claims: Common Varieties of Minerals: Special Value --
Mining Claims: Common Varieties of Minerals: Unique Property

Whether a deposit of stone is an uncommon variety under sec. 3 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 611 (1976), and therefore locatable under the mining law depends on whether the deposit has a property which gives it a distinct and special value as compared with other deposits of similar materials. It must be shown that the material under consideration has some property which gives it value for purposes for which other materials are not suited, or, if the material is to be used for the same purposes as other materials of common occurrence, that it possesses some property which gives it a special value for such uses, which value may be reflected by the fact that it commands a higher price in the market place.

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

The mere fact that a mineral deposit is an uncommon variety of stone does not make it per se marketable. The mining

claimant must show that the deposit within the claim is marketable at a profit.

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

In order to meet the marketability test a mining claimant need not rely on his own successful marketing efforts to prove marketability of material from the claim. The test may be satisfied if successful marketing by others has sufficiently established that claimant's comparable material is itself marketable.

APPEARANCES: Harold J. Baer, Jr., Esq., Office of the Solicitor, Denver, Colorado, for the Bureau of Land Management; George C. Morris, Esq., Salt Lake City, Utah, for appellees.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

The Bureau of Land Management (BLM) has appealed from a decision of Administrative Law Judge Harvey C. Sweitzer, dated September 11, 1979, dismissing Government contest complaint, WY 31195, with respect to the Chartreuse Nos. 4, 6, and 7 placer mining claims situated in sec. 3, T. 24 N., R. 70 W., and sec. 34, T. 25 N., R. 70 W., sixth principal meridian, Platte County, Wyoming. On September 27, 1971, appellees 1/ filed a patent application, W-31195, covering the subject claims.

On December 11, 1975, BLM issued a contest complaint against appellees' mining claims, charging:

- a. Valuable minerals have not been found within the limits of the claims so as to constitute a valid discovery within the meaning of the mining laws.
- b. The mineral material claimed is a common variety of building material, and, as such, not locatable under the mining laws as amended by the Act of July 23, 1955.

A hearing was held on December 20, 1977, in Cheyenne, Wyoming. Based on evidence adduced at the hearing, Administrative Law Judge Sweitzer held that the dolomitic marble which forms the basis of appellees' claims is not a common variety of mineral within the meaning of the Act of July 23, 1955, 30 U.S.C. § 611 (1976), and that it was, therefore, locatable under the mining laws. Furthermore, he held that

1/ The appellees are Mamie Vaughn, heir to Marlin Vaughn (deceased), Paul Shields, and Don Shields.

while the Government had established a prima facie case of the lack of the discovery of a valuable mineral deposit, nevertheless, appellees had proven by a preponderance of the evidence that a discovery had been made on all three claims.

[1] Section 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1976), provides that no deposit of a common variety of stone "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." That section also provides, however, that a deposit will not be considered a "common variety" if it has some property which gives it a "distinct and special value." 30 U.S.C. § 611 (1976).

In order to determine whether a deposit of stone has a property which gives it a distinct and special value there must be a comparison with other deposits of similar materials. As the Board stated in United States v. Thomas, 1 IBLA 209, 217, 78 I.D. 5, 11-12 (1971):

It must then be shown that the material under consideration has some property which gives it value for purposes for which other materials are not suited, or, if the material is to be used for the same purposes as other materials of common occurrence, that it possesses some property which gives it a special value for such uses, which value is reflected by the fact that it commands a higher price in the market place. [Emphasis added.]

See McClarty v. Secretary of the Interior, 408 F.2d 907 (9th Cir. 1969).

Walter C. Ackerman, formerly a BLM mineral examiner, testified for appellees that the dolomitic marble on the claims is of sufficient purity (95 percent calcium magnesium carbonate) to be used for metallurgical purposes (Tr. 150, 153).

In United States v. Chas. Pfizer & Co., Inc., 76 I.D. 331, 342-43 (1969), the Department held that "limestone containing 95 percent or more calcium and magnesium carbonates is an uncommon variety of limestone which remains subject to location under the mining laws." See 43 CFR 3711.1(b) (metallurgical or chemical grade limestone not a common variety). The Government presented no evidence to rebut this testimony by Ackerman. However, material from the claims had never been used for metallurgical purposes, nor had any attempt ever been made to market the material for those purposes.

Ackerman also testified that, because of its purity, texture, hardness, toughness, and color (white), the marble on appellees' claims has a distinct and special value (Tr. 150-52). Ackerman testified that the marble on the claims and that being successfully mined and marketed from the Basins Engineering Company's (Basins) quarry, located on privately-owned land one-half mile east of the Chartreuse No. 4 mining

claim, were "exactly alike, chemically, structurally, and texturally" (Tr. 144). These assessments were based on geological and petrographic examinations in 1965 and 1974 of samples taken from the subject claims and from Basins quarry (Tr. 138-39, 153-54; Exhs. E and E-1). Ackerman indicated that marble from the claims and marble from Basins was the same in that

geologically the setting here is also the same. We're in a metamorphic environment geologically there, and since the age of the rock is the same, we would expect under normal field examination that they are the same, but with a little sophistication using the microscope we can prove that they are the same rock.

(Tr. 144). William Addison, president of Basins which leases the claims, testified that there were probably not over six sources for white marble in the United States (Tr. 187). 2/ Addison also stated that the Chartreuse and Basins marble were of "comparable quality" (Tr. 180).

The principal market for the marble is for precast concrete panels, cultured marble, and landscaping (Tr. 91, 184, 186) for which, according to Ackerman, the marble from the claims should command a "premium price" (Tr. 157). On September 1, 1977, the price of marble from the Basins quarry ranged between \$18 and \$52 per ton (Exh. B). Other crushed stone averaged \$2 to \$3 per ton (Tr. 187).

On the other hand, based on samples taken from the claims, BLM mineral examiners characterized the marble as of "poor quality" based on its color (off-white or with a greenish or bluish cast) 3/ and the presence of mafic dikes (dark igneous rock zones intruding into the marble), which allegedly make the marble difficult to mine (Tr. 31, 37, 90). The marble was also felt to be of "poorer quality" than marble from the Basins quarry (Tr. 91). One of the BLM mineral examiners stated his opinion that the marble from Basins quarry was itself a "common variety" (Tr. 120).

2/ Prior to commencing operations at the Basins' quarry in approximately 1963, Addison conducted a market survey visiting stone deposits in approximately six other states "to determine how this deposit compared with the ones that were being worked in these other states" (Tr. 179). He was "impressed with the superiority [of Basins] enough to proceed with setting up an operation" (Tr. 179).

3/ Ackerman postulated that the surface material might appear other than white because of weathering over the ages. He stated that "[t]he surface material will fracture. Organic material will contribute somewhat to discoloration near the surface" (Tr. 151). One of the BLM mineral examiners admitted that the quality of the material would be better "below the weather zone" (Tr. 119-20).

BLM relies heavily on market research undertaken in August 1977 by John Kavel, a BLM mineral examiner, comparing the average prices of marble from the Basins quarry and other stone used for the "same purposes," namely precast concrete panels, cultured marble, landscaping, and other miscellaneous uses (Tr. 92-96; Exh. 31). ^{4/} This research indicated that Basins marble had an average price of \$29.60 per ton, while the average price for other stone used for the same purposes was \$35.66 per ton (Tr. 94; Exh. 31).

Appellees take umbrage with the market research offered by BLM, contending that it compared the price of Basins marble with that of unusual and unique ornamental stones that would qualify for uncommon variety status. Addison testified that "the prices that he's [BLM mineral examiner] arrived at are from very unique and ornamental stone deposits in the United States primarily, or pure ones for some reason that have unique characteristics. He's not getting an average price of common variety of material, if you will, in my opinion" (Tr. 187). Addison stated that the average price for crushed stone for landscaping is \$2 per ton (Tr. 187). In other words, appellees take the position that Basins marble was not compared with other stone "of common occurrence" in order to see whether it commanded a higher price. See United States v. Thomas, *supra* at 217, 78 I.D. at 12.

The market research offered by BLM provided the prices for other materials used for the same purposes as marble from the Basins quarry. These materials included granite, feldspar, scoria, and quartzite. There is no indication whether these materials were themselves common or uncommon varieties of stone (Tr. 106-07). It is a prerequisite for an adequate comparison that the stone in question be compared with deposits of common varieties in order to determine if it has a distinct and special value reflected by a higher market value. See United States v. Pope, 25 IBLA 199 (1976). The mere fact that the materials are used for the same purposes is not sufficient. The test must be applied to the

^{4/} The mineral examiner testified concerning his research method as follows:

"In conducting this study, I contacted various quarryers and producers across the country by telephone and asked them what rock -- materials they were using for these various uses, what prices were for these rocks FOB their plant.

"I took an average of these prices that I obtained and compared it with the figure I obtained for the Basins Engineering.

* * * * *

"The companies and rock types were selected from any information that I could obtain as to who produced material for uses similar to Basins Engineering, and these sources of information were the stone catalog, various possible publications involving stone -- mostly from the stone catalog and any other information I could get through those areas."

+4r. 93, 122 (emphasis added)).

stone in question versus known common varieties. If the stones for comparison are uncommon varieties, each exhibiting a distinct and special value, it would be virtually impossible for a stone to meet the test unless its characteristics were such as to command the highest market value. The Government failed to establish that the stones used for comparison purposes were, in fact, common varieties. Appellees' evidence supports a finding that the white marble on its claims is an uncommon variety of stone subject to location under the mining laws.

[2] Accordingly, we reach the question of whether there has been a discovery of a "valuable mineral deposit" on each of the three claims. 30 U.S.C. § 22 (1976). A "valuable mineral deposit" has been discovered where minerals have been found in such quantity and quality as to justify a person of ordinary prudence in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Chrisman v. Miller, 197 U.S. 313 (1905). This so-called "prudent man" test has been augmented by the "marketability test," which requires a showing that the mineral may be extracted, removed, and marketed at a profit. United States v. Coleman, 390 U.S. 599 (1968). The mere fact that a deposit is an uncommon variety of stone does not make it per se marketable. United States v. Foresyth, 15 IBLA 43, 60 (1974). The mining claimants must show that the deposit within each claim is marketable at a profit. United States v. Lease, 6 IBLA 11, 24, 79 I.D. 379, 385 (1972).

Where the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward to establish a prima facie case as to that charge; however, the mining claimant has the ultimate burden of establishing by a preponderance of the evidence a discovery of a valuable mineral deposit. Hallenbeck v. Kleppe, 590 F.2d 852, 856 (10th Cir. 1979); United States v. Zweifel, 508 F.2d 1150, 1157 (10th Cir. 1975), cert. denied, 423 U.S. 829 (1976); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).

Kavels testified that the marble from the subject claims had a "poor potential for marketing" as compared with marble from the Basins quarry due to its "off coloring," the presence of a "greater number of mafic dikes" and the necessity of "digging a pit rather than going into a hillside as at Basins Engineering" (Tr. 91). However, Kavels made no estimate of the thickness of overburden on the subject claims, especially as compared with that in the area of the Basins quarry, and made no specific cost comparison of mining as between the subject claims and the Basins quarry (Tr. 89). He stated that "it would be a little bit more difficult on the claims than on the Basins" (Tr. 89).

Based on his examination of the mining claims and his general mining experience, Kavels testified that a prudent person would not be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine (Tr. 103).

Through the testimony of the BLM mineral examiners, the Government established a prima facie case of lack of discovery of a valuable mineral deposit on each of the claims in question.

We must now examine the evidence to determine whether appellees have met their ultimate burden of proof on the discovery issue.

As we have already noted, Ackerman testified that the marble on the Chartreuse claims and in the Basins quarry are "exactly alike, chemically, structurally, and texturally" (Tr. 144). Addison agreed that based on a "limited amount of drilling" he had determined that "they are of comparable quality" (Tr. 180). Both marbles are described as "Wheatland marble" (Tr. 145).

Both Ackerman and Addison testified that the mafic dikes in the marble would present little or no difficulty in mining (Tr. 147-48, 189-90). Specifically, Ackerman testified:

I see no reason why it should inhibit in any way the development or mining of the property. In some instances if we're looking at a marble property several hundred feet across and you have a mafic dike or this hornblend schistose material setting in the middle of it only 20 feet wide, why should that -- if I were asking myself the question from a mining engineering standpoint -- prohibit me from developing the white marble any more than overburden over a coal seam. That is removed also.

(Tr. 147-48). Addison testified that in the Basins quarry they simply mined around the dike staying 10 feet away to avoid "discolored marble" (Tr. 189). He stated the same could be done on the Chartreuse claims (Tr. 190). The Government's mineral examiners essentially admitted that such a mining method could be undertaken on the claims (Tr. 45-46, 110-11).

Addison testified that mining of the marble from the Chartreuse claims would pose no significant problem (Tr. 190). The mining methods used on the Basins quarry and the Chartreuse claims would essentially be the same (Tr. 190; Exh. E at 18). Both operations require the removal of overburden in order to get to the white marble.

Ackerman estimated the quantity of the deposit on the three claims to be between 700,000 and 1,000,000 tons (Tr. 157), while Addison estimated "in excess of half a million tons" (Tr. 203).

As we stated above, each of the claims contains a locatable mineral. While the evidence concerning the extent of the deposit on each claim is sketchy, the Administrative Law Judge properly found that geological inference could be utilized to establish the existence of a minable quantity of material. He stated:

Geological inference may be relied on to support a determination that a discovery of a valuable mineral deposit has been made after there has been actual exposure of such a deposit, and as stated above, an exposure of locatable marble has been shown to exist on each claim. Although no business records were presented, Mr. Addison testified that several carloads of marble have been mined from Chartreuse No. 6 and sold at a premium price. ^{5/} Mr. Addison further testified that holes were drilled on the claims by Basins Engineering in the mid 1960's, and later plugged with wooden pegs. The core samples which were taken no longer exist but it was testified that this drilling and other exploration indicated the marble on the claims to be of similar quality to that being marketed by Basins Engineering. (Tr. 180, 181, 201, 202)

This evidence of drilling and other exploration did not disclose the outline of what I have found to be locatable marble on the claims. Such delineation of an ore body would be required under some circumstances before geological inference could be relied on to support a determination that there was a discovery of a valuable mineral deposit. See United States v. Edeline, 39 IBLA 236 (1979). Certainly such delineation would be preferred in a case such as this; nevertheless, all facts must be considered and judged by the reasoning of United States v. Larsen, 9 IBLA 247 (1973) which states:

While geologic inference may not be relied upon to establish the existence of a mineral deposit, it may be accepted as evidence of the extent of a deposit. That is, where ore has been found, the opinions of experts, based upon knowledge of the geology of the area, the successful development of similar deposits on adjacent mining claims, 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

^{5/} Addison testified that around 1965 between five and six carloads of material were mined from the Chartreuse No. 6 claim and shipped to customers in Illinois and Florida (Tr. 181). The Solicitor's Office points out in its brief on appeal (Brief at 2) that since the Chartreuse No. 6 claim was not located until 1971, it must be assumed that the removal of material for 1965 sales was a trespass. While appellees would be liable for the trespass, it does not negate the fact that material from the area, later located as the Chartreuse No. 6 claim, was marketed at a "premium price."

a discovery -- may properly be considered in determining whether ore of the quality found, or of any mineable quality, exists in sufficient quantity to justify a prudent man in the expenditure of his means with a reasonable anticipation of developing a valuable mine. [Citations omitted.] (9 IBLA 262)

(Decision at 8-9).

[3] Essentially, the Government's evidence concerning marketability rested on its characterization of the deposits on the claims as being inferior in quality to the Basins' material, and therefore, harder to market. 6/

Without respect to marketing stone from the subject claims, Addison testified:

He [a BLM employee] basically warned me or threatened me. I felt it was a threat that if they were found to be a common variety then we would have to pay triple damages for every ton shipped inasmuch as we also had private deeded land that we could produce from. Until such time as we could obtain patents or clarify the status, it would not seem prudent to proceed.

Tr. 180-81).

Concerning sales made from the Chartreuse No. 6 claim, Addison's testimony was as follows:

A We got a premium price. This Chartreuse variety that we shipped down there -- we were primarily trying to

6/ BLM also presented evidence that appellees failed to develop the subject claims. The alleged absence of mining activity or sales is an admittedly weak basis for a prima facie case. See United States v. The Dredge Corp., 54 IBLA 281, 287 n.1 (1981). The evidence presented by appellees has overcome any presumption which arose solely on the basis of lack of production. See United States v. Hooker, 48 IBLA 22, 37 (1980). Specifically, appellees offered evidence that the Basins quarry, which began operation in December 1964, has operated at a profit, with sales of marble, comparable to that on the Chartreuse claims, in 1977 in the amount of 76,000 tons (Tr. 185, 192). Production generally has increased over the years (Tr. 185; Exh. A). At an average price of \$26.50 per ton, Ackerman estimated in 1974 that, taking into account all production costs, sale of the Basins marble would result in a "net profit" of \$3.65 per ton (Exh. E at 28). Addison testified that mining of the Chartreuse claims could, likewise, be done at a profit (Tr. 185).

establish full marketability rather than to penetrate it with this overhanging our heads. We were trying to establish it, and I felt that five or six cars was enough to establish it, and we quit mining only because of the BLMs' [sic] indication to us that we might be liable for triple damages if they were found to be common.

Q Applying what we've referred to as a prudent-man test, if it were not for this possible contest of the locatability of this particular material, would you have gone ahead and developed those claims?

A Definitely.

Q And developed a market for them similar to what you've done on Basins Engineering's present property?

A Yes.

(Tr. 181-82).

In Verrue v. United States, 457 F.2d 1202 (9th Cir. 1972), the court held that lack of sales and the abundance of other similar material in the area would not support a finding of lack of marketability in the face of positive evidence of marketability.

The court in Melluzzo v. Morton, 534 F.2d 860 (9th Cir. 1976), characterized Verrue as follows at 863: "Verrue makes it plain that the claimant need not rely on his own successful marketing efforts to prove marketability of his material. If the successful marketing by others has sufficiently established that the claimant's comparable material is itself marketable, that can suffice." (Footnote omitted.) The evidence supports a finding that appellees' material is of such a quality and quantity that it may be presently extracted, removed, and marketed at a profit.

The Administrative Law Judge properly concluded that appellees satisfied the ultimate burden of showing by a preponderance of the evidence that there was a discovery of a valuable mineral deposit on each of the contested claims and he correctly dismissed the contest complaint. ^{7/}

^{7/} Even though this case involves a patent application, it does not present the situation as outlined in United States v. Taylor, 19 IBLA 25, 26, 82 I.D. 68, 74 (1975), which would require a further hearing. See also United States v. Martinez, 49 IBLA 360, 375-76, 87 I.D. 386, 393-94 (1980).

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

C. Randall Grant, Jr.
Administrative Judge