

UNITED STATES

v.

KEITH J. HUMPHRIES

A-30239

Decided

APR 16 1965

Mining Claims: Contests

Where a Government contest is brought in 1962 against sand and gravel placer claims located on July 16, 1955, charging that no discovery has been made because the minerals cannot be marketed at a profit and that an actual market has not been shown to exist, the charges are properly to be construed as raising the issue whether a valid discovery of common varieties of sand or gravel had been made prior to July 23, 1955, the date of the act prohibiting mining locations for such minerals thereafter; in any event, the contest will not be dismissed where it appears that Government counsel specifically stated the issue at the hearing, the contestee did not object at the time, and the contestee does not claim that he had no opportunity to submit evidence on the issue or that he has new evidence to submit on the issue at a new hearing.

Mining Claims: Discovery--Mining Claims: Common Varieties of Minerals

To satisfy the requirement for discovery on a placer mining claim located for common varieties of sand and gravel a few days before July 23, 1955, it must be shown that the materials within the limits of the claim could have been extracted, removed, and marketed at a profit before that date, and where the evidence shows that prior to that date no sales had been made from the claim and the quantity of sand and gravel on the claim had not been ascertained, even though sand and gravel of like quality was being sold in the vicinity, the mining claim is properly declared null and void.

Mining Claims: Common Varieties of Minerals

Where a mining claimant fails to show that pea gravel in a mining claim is a gravel having some property giving it a special and distinct value, the claim is not locatable under the mining law after July 23, 1955.



UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

A-30239

United States

v.

Keith J. Humphries

: New Mexico Contests
: Nos. 111 and 112

: Placer mining claims
: declared null and void

: Affirmed

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Keith J. Humphries has appealed to the Secretary of the Interior from a decision of the Assistant Director of the Bureau of Land Management, dated December 20, 1963, which affirmed a decision of a hearing examiner declaring his placer mining claims, Caliche Nos. 1 and 2, located for sand, gravel, clay, kaolin, caliche, and red earth products in Dona Ana County, New Mexico, null and void for lack of a discovery of a valuable mineral deposit within the limits of each claim.

Humphries located the Caliche No. 1 claim on July 16, 1955, and his brother-in-law, R. K. Loomis, located the Caliche No. 2 on the same day. On October 1, 1960, Loomis conveyed his claim to Humphries. On April 11, 1962, the Santa Fe land office brought contests against the two claims, charging

- "(1) Minerals have not been found within the limits of the claim in sufficient quantity to constitute a valid discovery.
- "(2) No discovery of valuable mineral has been made within the limits of the claim because the mineral materials present cannot be marketed at a profit, and it has not been shown that there exists an actual market for these materials".

Humphries filed an answer, denying the charges and submitting argument and statements of third persons on the mineralization of the claims. At the hearing on December 5, 1962, Humphries was represented by counsel and he testified in his own behalf and as an adverse witness for the contestant.

It is not disputed that Humphries could locate a mining claim for sand and gravel 1/ on July 16, 1955. Layman v. Ellis, 52 L.D. 714 (1929); Solicitor's opinion, 54 I.D. 294 (1933). However, the mining laws were amended on July 23, 1955, 69 Stat. 368, 30 U.S.C. § 611 et seq. (1958), to provide that

"A deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall not 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 * * *"

and that

"'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 * * *," 2/

Under the 1955 act, therefore, the validity of Humphries' mining claims depends upon whether (1) he had made a discovery of valuable deposits of common varieties of sand or gravel on the claims at some time before July 23, 1955, while the minerals were still locatable or (2) he has made a discovery on the claims, regardless of date, of valuable deposits of otherwise common varieties of minerals which have some property giving them distinct and special value.

1/ Although the notices of location stated that the claims were located for sand, gravel, clay, kaolin, caliche, and red earth products, appellant has made no effort at any time to establish any value for clay, kaolin, and red earth products and there has been only meagre and oblique references to the value of caliche in the claims. The validity of the claims therefore stands or falls on whether a valid discovery of sand or gravel was made on the claims.

2/ This act was amended on September 28, 1962, 76 Stat. 652, 30 U.S.C. § 611 (Supp. IV, 1964), in a respect not material here.

At the outset the contestee renews his objection that the contest complaint did not raise the issue whether there had been a valid discovery of sand and gravel prior to July 23, 1955. He asserts that the charges in the complaint are stated in the present tense and therefore that the issue of discovery prior to July 23, 1955, is outside the scope of the pleadings.

It is true that the charges in the complaint could have been more accurately phrased. However, there is nothing to show that the contestee was unaware of the essential nature of the charges. He must be presumed to have known of the act of July 23, 1955, which removed common varieties of sand and gravel from mining location after that date. The charges would have no meaning if they are interpreted as alleging only that no discovery had been made on April 11, 1962, the date of the complaint. To put it another way, the validity of the claims would not be established simply by proof that a valid discovery of a common variety of mineral existed on April 11, 1962.

At the close of the Government's case at the hearing, contestee moved for dismissal on the ground that the Government had failed to make a prima facie case (Tr. 71). In answer Government counsel very explicitly stated that it was the Government's position that under the act of July 23, 1955, a discovery of a common variety of mineral must be made prior to July 23, 1955 (Tr. 74). The contestee expressed no disagreement with or surprise at this assertion. In fact, as shown later, he questioned witnesses later concerning operations in 1955. He attempts now, however, to explain away his failure to object to Government counsel's statement of the issue by saying he had already stated his interpretation of the complaint in his opening argument on the motion. A reading of contestee's argument on his motion to dismiss fails to disclose that he addressed himself to the point as of what time a discovery must be shown. In the face of Government counsel's specific response, it is not possible to interpret contestee's subsequent silence as being other than acquiescence in the understanding of the charges.

In any event, even if contestee's position were accepted and the complaint ordered dismissed, this would not establish the validity of the claims. It would not bar the filing of new charges specifically raising the issue of lack of discovery prior to July 23, 1955. Contestee does not claim that he was deprived of the opportunity to submit evidence of discovery prior to July 23, 1955, or that he has new evidence on that point which he could produce at a new hearing. Consequently, we are unable to conclude that contestee was misled by the charges or that, if he were, he was prejudiced in any way.

We turn then to the merits of the case.

The claims are located approximately 4 miles northeast of Las Cruces, New Mexico. They are bisected diagonally by U.S. Highway 70. According to Richard A. Kennedy, a consulting geologist testifying for contestee, the claims are located on an alluvial fan. He stated that the fan or a series of fans extend for a distance of from 60 to 100 miles, with an estimated minimum thickness, consisting primarily of sand, gravel, and caliche, of 300 feet and a maximum of 1,333 feet. (Tr. 80, 83, 85, 92.) Kennedy and other witnesses testified that the sand and gravel on the claims are the same as the sand and gravel found elsewhere in the area (Tr. 87, 19, 22, 31, 40, 101, 158, 161).

There are three large pits near the claims from which large quantities of sand and gravel have been removed. The closest is the Martin Redi-Mix, which extends to about 200 feet from the claims. Next closest is the Brown Construction Co. pit, and down the highway about a half a mile is the Associated Materials pit. (Govt. Exh. 1.) The Martin pit is about 30 feet deep (Tr. 28, 89). The testimony was that the materials on the claims are the same as those in the pits (Tr. 39, 113, 114, 121, 133, 142).

The contestee testified that he had not removed or sold any material from his claims since their location on July 16, 1955 (Tr. 8, 9, 175). He said he first looked around in the area in 1949, dug a few shovel holes, and found sand and gravel at the surface. In 1951 and 1952 he hauled out sand and gravel which he used for concrete in building a driveway and sidewalks for his home. When he located his claim, he merely took a shovel and dug holes here and there. He dug no auger holes, test pits, or holes with a bulldozer. He did not have to dig, he said, because cuts in the highway, one 6 feet deep, showed existence of sand and gravel. (Tr. 162-164.) Earlier he had testified to making a number of bulldozer cuts to a maximum depth of 4 or 5 feet, going no deeper since he ran into sand (Tr. 7-8). He did not say when the cuts were made.

The Government witnesses, two mining engineers, testified as to their examination of the claims in 1961 and 1962. They observed a number of pits and cuts in which sand and gravel are exposed, the deepest cuts being 6 feet. (Tr. 13, 16, 17, 22, 36, 37.) One of the two testified that there was no basis for determining the quantity of sand and gravel in the claims since the depth of the deposit was unknown (Tr. 17, 18, 25). He said that further prospecting was necessary before a mining operation could be set up (Tr. 20, 22-25) and that he would want to prove at least 10 or 12 feet of merchantable sand before investing in the claims (Tr. 31).

The other witness concurred that the present state of development on the claims would not warrant a prudent man in developing a paying mine on the claims (Tr. 39), that he could not assume a 50-foot thickness of sand and gravel on the claims (Tr. 57), and that he would want to test to a depth of 20 or 25 feet to ascertain the percentages of sand, gravel, and waste material in order to determine what the cost of production would be and what he might be able to expect from the market so that he could determine whether a profit could be realized (Tr. 69-70).

Kennedy estimated that there are 9 million cubic yards of good usable sand and gravel on the claims. He based his estimate on the geology of the area, the log of a well drilled about 450 yards ^{3/}away from the claims, and what he found in an arroyo near the claims and in the Brown and Martin pits (Tr. 89, 90, 97). He said he would advise one that there were sufficient quantity and quality of sand and gravel on the claims to start a commercial operation (Tr. 91, 100).

Four witnesses for the contestee, who had worked the Martin, Brown, or Associated pits testified that in their opinion the sand and gravel on the claims could be mined at a profit (Tr. 112, 122, 142, 159).

As stated earlier, so far as the validity of the contestee's claims depends upon a discovery of common varieties of sand and gravel, such discovery must be shown to have existed prior to July 23, 1955. This necessitates showing not only that sand and gravel of marketable quality existed on the claims at that time but also that the sand and gravel existed in sufficient quantities to warrant development with a reasonable prospect of success. Thus, in United States v. Charles H. and Oliver M. Henrikson, 70 I.D. 212 (1963), the Department held invalid a sand and gravel claim located on March 6, 1953, because there was no showing that prior to July 23, 1955, a sufficient quantity of material existed on the claim to warrant a prudent man in expending his labor and means with a reasonable prospect of success in developing a valuable operation. This conclusion was reached despite the fact that the claim adjoined another claim which was held valid because sand and gravel were being profitably removed and sold from that claim and that the quality of the gravel appeared to be similar on both claims. The Department's decision was sustained in Henrikson v. Udall, 229 F. Supp. 510 (N.D. Calif. 1964), appeal pending.

As the summary of the evidence shows, even at the date of the hearing in 1962 there had been no tests made to determine the depth of the sand and gravel deposits on the Caliche claims. As the Government

^{3/} This is the distance indicated on Govt. Exhibit No. 1. The testimony was that it was 100 or 200 yards away (Tr. 83, 103).

witnesses testified, the shallow cuts and pits on the claims are wholly insufficient to determine whether there is any material at depth on the claims. In fact, the contestee's testimony indicates strongly that by July 23, 1955, he had done nothing more than to dig holes on the claims with a shovel. The cuts apparently were made later. Thus, while it has been shown that sand and gravel of commercial quality were known to exist on the claims prior to July 23, 1955, there has been no showing of quantity.

The only evidence as to the amount of material on the claims is the estimate made by witness Kennedy. However, the estimate is based solely upon geologic inference. Assuming, without deciding, that where the presence of minerals is physically exposed on a claim the quantity of such minerals can be established by geologic inference, there was no showing that the factors relied upon by Kennedy were in existence prior to July 23, 1955. Possibly the general geology was then known but we cannot accept the general geology of alluvial fans extending from 60 to 100 miles in length as establishing the depth of sand and gravel on two particular 20-acre tracts in this huge area. As for the more specific factors, there is no showing as to when the well upon which Kennedy relies was drilled. Also there is no showing that the Martin Redi-Mix pit or the Brown pit was in existence prior to July 23, 1955, or, if they were, what depth of sand and gravel had been exposed in the pits by July 23, 1955. John Lewis, present owner and operator of the Associated Materials pit, testified that he hauled sand and gravel from the Brown and the Martin pits "since 1955" (Tr. 108-109). Later he said he did not know whether he had worked the Martin pit at all (Tr. 113). That he did is doubtful since T. J. Martin, president of the Martin Redi-Mix Concrete Company, testified that he worked the Martin pit "from 1956 sometime" (Tr. 139-140). No witness for the contestee testified to any operations from the Brown or Martin pits prior to July 23, 1955, and Bureau of Land Management records of sales of sand and gravel in the area showed no sales of sand and gravel in 1955. ^{4/}

The Associated Materials pit was operated in 1955. Eddie Perez testified that he worked it from 1946 to 1956 (Tr. 157). However, Kennedy did not examine the Associated pit, only the Brown and Martin pits (Tr. 96-97). His estimate was based upon the exposure in those two pits the existence or extent of which prior to July 23, 1955, has not been shown. As for the Associated pit the contestee himself testified that he was not acquainted with the pit prior to locating

^{4/} The Martin pit appears to be on public land and sand and gravel from it have been and are being sold under the Materials Act of July 31, 1947, 61 Stat. 681, as amended, 30 U.S.C. §§ 601-603 (1958).

his claims, that "I didn't know any of them or any of their workings, in fact I don't think they were in existence in 1955" (Tr. 167). He was apparently acquainted only with a pit operated by Ed Murphy near the Highway pit (a fourth small pit shown on Government's Exhibit 1) or the Collins pit (apparently another name for the Martin pit), probably closer to the Highway pit (Tr. 166).

There is, therefore, no showing that there were exposures of sand and gravel in the Brown or Martin pits from which the quantity of sand and gravel in the Caliche claims could have been inferred before July 23, 1955. There is also no showing as to the extent of the exposure in the Associated pit half a mile away prior to July 23, 1955, but in any event the contestee knew nothing about it. And, there is no other evidence from which a reasonable inference could be drawn as to the quantity of marketable sand and gravel that existed at that time in the Caliche Nos. 1 and 2.

Even if it were established that sand and gravel of sufficient quality and quantity were found on the two claims prior to July 23, 1955, this would not suffice to establish a valid discovery, for there is absent a showing of any demand at the time for sand or gravel from the two claims. Solicitor's opinion, 69 I.D. 145, 146 (1962). The fact that sand and gravel might have been produced and sold commercially from other land in the vicinity would not prove that there was a demand for the material from the particular claims in question. In all material respects, the situation presented here is comparable to that obtaining in the Las Vegas, Nevada, area. There, as here, is an extensive area where sand and gravel of generally uniform quality suitable for commercial purposes can be found. There, as here, the enormous quantities of sand and gravel available far exceeds the demand. ^{5/} In United States v. R. B. Borders et al., A-28624 (October 23, 1961), the Department held invalid certain sand and gravel placer claims in the Las Vegas area on the ground of lack of discovery. The decision was attacked but thus far has been affirmed by the United States District Court for the District of Nevada. Osborne v. Hammit, Civil No. 414, August 19, 1964; appeal pending.

^{5/} One of the Government witnesses testified that other public land in the immediate vicinity, from one-half to one mile from the Caliche claims and traversed by the same highway, has sand and gravel of the same nature but no one has ever applied to the Bureau of Land Management to purchase the material under the Materials Act, supra (Tr. 40-45).

The claimants in the Osborne case argued that the evidence in that case showed that the contested claims had the same quality sand and gravel as that being sold in the area, that the claims were accessible to the market and three miles from a profitable operating pit, that there was a demand for sand and gravel in the area, that they could get their share of the business, that the hearing officer sustained their claims. In sustaining the Department the District Court adverted to the fact that there were in excess of 800 sand and gravel claims encompassing 100,000 or more acres in the Las Vegas area. The court said:

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

* * * * *

* * * Sand and gravel of the same general quality found in the Bradford Claims is readily available in thousands of adjoining acres. The burden of the proponent, plaintiffs here, is not simply to preponderate in the evidence produced, its burden is to produce a preponderance of credible evidence, and the trier of fact is not required to believe or to give weight to testimony which is inherently incredible. It is apparent from the evidence that if, in June 1952, owners of other claims near Las Vegas had commenced to produce and market sand and gravel from their properties, such action would have filled the theoretical void in the supply of the material to the Las Vegas market, rendering the Bradford Claims valueless. The plaintiffs failed to enter the race to supply the theoretical insufficiency of production of sand and gravel. If they had done so successfully, they would have satisfied the requirements of Foster v. Seaton (supra) [271 F. 2d 836 (D.C. Cir. 1959)] by proving bona fides of development and present demand. Their failure so to act contradicts the speculative, hypothetical and theoretical testimony on which they rely."

These observations of the court are directly pertinent to the situation here. We have two claims from which the claimant has not removed and sold a shovelful of sand or gravel since he located the claims. Although three of contestee's witnesses testified that there was a market for sand and gravel prior to July 23, 1955 (Tr. 110, 130, 158), only one specifically gave his opinion that sand and gravel could have been mined from contestee's claims at a profit at that time (Tr. 159). This is the type of speculative hypothetical, and theoretical testimony to which the court gave little credence in the Osborne case. There was no showing in this proceeding that there was an unfulfilled demand for sand and gravel in the Las Cruces area, that there was a market that could not be supplied from an existing operation. In short, there is no evidence that a market existed for the sand and gravel on the Caliche claims prior to July 23, 1955, assuming that sand and gravel existed on the claims in sufficient quantities to warrant development.

This leaves the question whether the claims are valid because of a discovery of an uncommon variety of sand or gravel on them. The contestee contends that there is such a discovery, that the claims contain pea gravel which is in demand as a roofing material. Pea gravel sells for a higher price than ordinary gravel (Tr. 129). However, the evidence on the pea gravel in the Caliche claims is meagre. Lewis said he was interested in the pea gravel, that there is an abundance of it in the Caliche claims, a lot more than in the Associated pit. He did not know whether or not it was obtainable elsewhere in the area. (Tr. 119.) E. W. Wood, who said he had "cleared off" about a half acre of the Caliche claims, stated that he had cut through $2\frac{1}{2}$ feet of overburden to sand and gravel and uncovered "plenty of pea gravel." (Tr. 133-136).

This is all the evidence in the record as to a discovery of pea gravel. As indicated in Lewis' testimony, pea gravel is found in the Associated pit. Martin also stated that there was pea gravel in the Martin pit (Tr. 140). And, as we have seen, there was unanimity of testimony that the sand and gravel deposits in the Caliche claims are like the extensive sand and gravel deposits occurring elsewhere in the Las Cruces area. There is therefore no evidence to indicate that the occurrence of pea gravel in the Caliche claims is unique in any way. Moreover, despite the statements that there is an abundance of pea gravel on the Caliche claims, as we have seen, tests have never been made as to the depth of the deposits on the claims. Whether pea gravel exists in sufficient quantities to warrant a person of ordinary prudence in developing the claims for pea gravel is therefore far from established.

This discussion assumes that pea gravel is an uncommon variety of gravel having some property giving it special and distinct value. There was in fact no testimony that it has any unique property giving it special value. So far as the record shows, it may be inferred that pea gravel is simply small size gravel which presumably could be screened out of any ordinary gravel deposit.

It is to be borne in mind that the burden of proving a discovery of a common variety of sand or gravel on the claims prior to July 23, 1955, or a discovery of an uncommon variety at any time rested on the contestee. Foster v. Seaton, supra; Osborne v. Hammit, supra. He has clearly failed to sustain that burden, particularly in respect to showing a discovery of an uncommon variety of gravel.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F. R. 1348), the Assistant Director's decision is affirmed.

Ernest F. Horn

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