

UNITED STATES
v.
ROBERT D. FISHER

IBLA 86-1036

Decided July 26, 1990

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer, declaring the Collins Nos. 1 and 2 placer mining claims null and void. Arizona 15773-1.

Affirmed.

1. Mining Claims: Determination of Validity--Res Judicata

The Government is not collaterally estopped to determine the validity of an unpatented mining claim even where the Government has previously unsuccessfully contested a neighboring mining claim encompassing an arguably similar mineral deposit.

2. Mining Claims: Common Varieties of Minerals: Special Value--Mining Claims: Contests--Mining Claims: Determination of Validity

A deposit of sand will be considered a deposit of a common variety of mineral where the claimant fails to overcome by a preponderance of the evidence the Government's prima facie case that the sand does not have a property which gives it a distinct and special value, as reflected in a higher market price or reduced cost of production.

3. Mining Claims: Common Varieties of Minerals: Generally-- Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Discovery: Marketability

A mining claim for a common variety of sand is properly declared invalid where the claimant fails to overcome by a preponderance of the evidence the Government's prima facie case that the sand was not marketable at a profit prior to July 23, 1955.

APPEARANCES: Robert D. Fisher, pro se; John W. Zavitz, Esq., Office of the General Counsel, U.S. Department of Agriculture, Albuquerque, New Mexico, for the Government.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Robert D. Fisher (appellant) has appealed from the February 27, 1986, decision of Administrative Law Judge Harvey C. Sweitzer, declaring the Collins Nos. 1 and 2 placer mining claims null and void for lack of a discovery of a valuable mineral deposit. 1/ Judge Sweitzer specifically found that the sand on the claims was a common variety under 30 U.S.C. § 611 (1982), and that appellant had failed to establish that this sand could be mined, removed, and marketed at a profit prior to July 23, 1955, after which date common varieties of sand were no longer subject to location.

The two contested mining claims were originally located as the "Earl Collins Placer Mining and Sand Claims, Nos. 1 and 2" by Earl E. Collins on June 11, 1938, and are still known as the "Collins claims." Following a series of conveyances, these claims were conveyed to Fisher Contracting on March 30, 1972. 2/

On April 4, 1972, Fisher Contracting filed an application for a patent of the Collins claims with the Bureau of Land Management (BLM) (A-6901). No final action was taken with regard to that application, and, on October 10, 1980, Fisher Contracting filed a new patent application (A-15773). In response to that application, BLM, on behalf of the Forest Service, U.S. Department of Agriculture (FS), issued a contest complaint on December 20, 1983, charging, inter alia, that the subject claims are null and void because they were not supported by the discovery of a valuable mineral deposit as of July 23, 1955, or thereafter. Fisher Contracting answered the complaint timely, denying all of the charges, and the matter was referred to Judge Sweitzer for a hearing and decision.

1/ In its answer to appellant's statement of reasons (SOR), the Government moved to dismiss appellant's appeal for lack of standing because there was no evidence that appellant was the "successor in interest of record" to the Fisher Contracting Company (Fisher Contracting), which had held the mining claims at issue at the time of Judge Sweitzer's decision and had originally brought the appeal. In response to this motion, we ordered appellant to provide evidence "of Robert D. Fisher's relationship to [Fisher Contracting] and its interests." Appellant subsequently informed the Board that Fisher Contracting had quitclaimed the two Collins claims to him on July 17, 1986. In view of this, we are satisfied that appellant is the successor in interest to Fisher Contracting and, thus, has standing to pursue the present appeal.

2/ Collins originally conveyed the claims to F. L. Christensen on July 2, 1941. In April 1946, Orville M. Pendergrass acquired these claims from Christensen by quitclaim deed that was subsequently lost and never recorded. On Sept. 27, 1966, Pendergrass filed what purported to be amended notices of location of these claims, changing their names to the Collins Nos. 1 and 2 and, evidently, taking in some new ground. Twenty-one years after his initial acquisition from Christensen, Pendergrass recorded a Mar. 24, 1967 quitclaim deed from the heirs of Christensen. Finally, on Mar. 30, 1972, Pendergrass conveyed the claims to Fisher Contracting.

Following a hearing, Judge Sweitzer issued his decision, and Fisher Contracting timely appealed. Subsequently, Fisher Contracting dissolved, but, prior to its dissolution, it conveyed the subject claims to Robert D. Fisher. Therefore, Fisher has been substituted for Fisher Contracting as the party appellant.

The Collins Nos. 1 and 2 placer mining claims are situated on Sugarloaf Mountain near the San Francisco Peak, 11 air miles from Flagstaff, Arizona. They encompass approximately 40 acres of land in secs. 13 and 24, T. 23 N., R. 7 E., Gila and Salt River Meridian, Coconino County, Arizona, within the Coconino National Forest. Their exact position on the ground was the subject of substantial controversy but is adequately known to allow con-sideration of the validity of the claims.

The Collins claims are situated adjacent to or near five patented mining claims. Two of these patented claims (Kincanon No. 1 and Fisher No. 1) were patented on the basis of their rock deposits. The other three claims (Fisher No. 1A, More Sand, and Moon Sand) were patented on the basis of their sand deposits. The asserted validity of the Collins claims is, likewise, based on sand deposits.

The sand claims, including the Collins claims, encompass the closest sand deposits to Flagstaff. They contain what is variously described as "mountain sand" or "tephra sand." According to the record, this sand was created by a geologically recent volcanic eruption of Sugarloaf Mountain (called a "base surge"), which pulverized rock into tiny particles and spread it over the area generally downslope of Sugarloaf Mountain from the northwest to the east. ^{3/} The mountain sand is distinguishable from

^{3/} According to appellant's witness, Michael F. Sheridan, Ph.D., all four Collins claims are underlain by a "primary sand" which is underneath a surface layer of "colluvium." This primary sand was deposited in the first stages of a volcanic explosion, known as a "base surge" (Tr. 366). The eruption of Sugarloaf Mountain began 220,000 years ago when molten material from the subsurface of the earth moved toward the surface. When this mol-ten material came in contact with water-saturated soil on the subsurface, it caused a steam-blast type of eruption. The energy of this eruption was enough to blanket the surrounding area with "tephra" (Tr. 373). "Tephra" is a term referring to all of the material thrown from a volcano, not just the material related to magma, but also the covering rock which had existed at the time of the eruption. The little fragments of the covering rock produced a volcanic structure that is termed a "tuff ring" because it has the general shape of a ring with a crater in the center (Tr. 373). In a "base surge," steam clouds that are heavily laden with steam and wet particles move out as a turbulent mass at a very high speed along the ground and spread some distance, depending on the topography. This blast cloud completely destroys prior vegetation, depositing the existing rock blasted from the volcano. In the case of Sugarloaf Mountain, after the eruption, glaciers and ensuing erosion deposited a layer of soil known as "colluvium" on the area surrounding the crater (Tr. 384). This was followed later by the deposition of cinders from a nearby "basaltic cinder eruption" (Tr. 380). Erosion then deposited another layer of colluvium on top of

so-called "alluvial sand," which is deposited by water. Alluvial sand is found in the Verde River Valley, approximately 50 air miles from Flagstaff at an elevation approximately 4,000 feet below Flagstaff. The record demonstrates unequivocally that a great deal of sand has been removed from the Sugarloaf Mountain deposits over the years.

Stating the general legal principles which govern a determination of the validity of mining claims for minerals such as sand will facilitate an understanding of the issues involved in this appeal. In order for any mining claim to be valid, there must be the discovery of a valuable mineral deposit. 30 U.S.C. § 22 (1982). It is well established that a valuable mineral deposit exists where minerals have been found in such a quantity and of such a quality 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 (1894), approved in Chrisman v. Miller, 197 U.S. 313, 322 (1905). In United States v. Coleman, 390 U.S. 599 (1968), this prudent-person test was refined and complemented by the marketability test, which requires that a claimant show that the mineral in question can be presently extracted, removed, and marketed at a profit.

With respect to mining claims located for sand deposits, section 3 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 611 (1982), removed common varieties of sand from the category of minerals locatable under the mining laws, as of the date of enactment. Section 3 expressly provides that "[n]o deposit of common varieties of sand * * * 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." 30 U.S.C. § 611 (1982). However, the section further provides that sand will not be considered a "common variety" (and may therefore support a valid mining claim) if it has a unique property which gives it a "distinct and special value." It is well established that such distinct and special value must be reflected in a higher market price for or reduced costs of producing the sand. See McClarty v. Secretary of the Interior, 408 F.2d 907, 909 (9th Cir. 1969); United States v. McCormick, 27 IBLA 65, 83-84 (1976).

On the other hand, if the sand does not possess a unique property which gives it a distinct and special value and is therefore a common variety, the mining claim is valid only if the claimant can establish that the deposit satisfies the prudent person/marketability test as of July 23, 1955, and reasonably continuously thereafter. United States v. O'Callaghan, 29 IBLA 333, 337 (1977), aff'd, O'Callaghan v. Morton, No. 78-2588 (9th Cir. May 8, 1980); United States v. Taylor, 19 IBLA 9, 18, 82 I.D. 68, 70 (1975).

fn. 3 (continued)

the cinder layer. In general, the colluvium is characterized by more dirt and organic material than the sand and rock layer resulting from the initial volcanic eruption. Sheridan stated that the upper layer of colluvium was from 4 to 10 feet thick, with an underlying layer of primary sand which would vary at least between 3 and 12 feet in thickness (Tr. 417-18, 422-24).

In a contest proceeding, the Government initially bears the burden of establishing a prima facie case that a mining claim is invalid, where- upon the claimant assumes the ultimate burden of refuting the Government's case by a preponderance of the evidence. See Humboldt Placer Mining Co. v. Secretary of the Interior, 549 F.2d 622, 624 (9th Cir.), cert. denied, 434 U.S. 836 (1977); United States v. Ware, 113 IBLA 1, 5 (1990).

In his decision, Judge Sweitzer declared the Collins claims null and void, holding that, while the evidence indicated that the sand encompassed by the subject claims has unique properties, appellant had failed to overcome by a preponderance of the evidence the Government's prima facie case that such properties do not impart a distinct and special value to the sand. Accordingly, he concluded that the sand is a "common variety" within the meaning of section 3 of the Surface Resources Act.

Because he regarded the sand as a common variety, Judge Sweitzer then turned to the question of whether the subject claims were supported by the discovery of a valuable mineral deposit prior to July 23, 1955, and thereafter. Judge Sweitzer ruled that appellant had also failed to overcome by a preponderance of the evidence the Government's prima facie case that the sand had not been marketable from the subject claims at a profit prior to July 23, 1955. Accordingly, he concluded that appellant had failed to establish the existence of a discovery at that time and declared the Collins claims null and void for lack of discovery.

Initially, we consider some general matters raised by appellant. Appellant suggests that Judge Sweitzer might have prejudged the question of whether the sand is a common variety as evidenced by the fact that he "unabashedly advocate[d] the United States Forest Service (USFS) policy that no sand deposit is locatable under the mining laws" (SOR at 2). Far from reflecting bias or prejudice, Judge Sweitzer's decision reflects a careful consideration of all of the evidence presented by both sides to this dispute. As in other cases, unsupported allegations of bias are properly disregarded. See Converse v. Udall, 262 F. Supp. 583, 590 (D. Ore. 1966), aff'd, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969); United States v. Johnson, 39 IBLA 337, 347 (1979), aff'd in part and rev'd in part, No. C-79-0486 (D. Utah June 17, 1981), appeals dismissed, Nos. 81-1808 and 81-1968 (10th Cir. Nov. 23, 1981).

Appellant also faults Judge Sweitzer for crediting the testimony of Howard A. Wirtz, the Government mineral examiner, asserting that Wirtz was not properly qualified to testify to the matters at issue in the present case. Citing Rodgers v. Watt, 726 F.2d 1376, 1380 (9th Cir. 1984), appellant states that "[t]he testifying mineral examiner must be an expert as to the marketability or value of the particular mineral," and then asserts that neither Wirtz' testimony nor his resume "relate one single instance of Wirtz having any training or experience in marketing Mountain Sand" (SOR at 3). Judge Sweitzer, however, carefully considered Wirtz' qualifications and amply justified his decision to allow Wirtz to testify as an expert witness with respect to the marketability of the sand found on the subject claims (Decision at 9). Appellant imposed no timely objection to Wirtz' qualifications at the hearing.

[1] Appellant contends that Judge Sweitzer's February 1986 decision is erroneous because the Government is collaterally estopped from declaring the subject mining claims invalid because Administrative Law Judge Rampton's June 12, 1975, decision in United States v. Forehand, Contest No. AZ 4602 (Forehand), had already resolved in appellant's favor the questions of whether the sand encompassed by the subject claims constitutes a common variety within the meaning of 30 U.S.C. § 611 (1982), and whether the sand was marketable at a profit prior to July 23, 1955.

The case of Forehand involved the More Sand and Moon Sand placer mining claims, which had been located virtually adjacent to the subject mining claims on October 29, 1953. Their location placed them west of the subject mining claims, closer to the summit of Sugarloaf Mountain. Following the filing of a patent application with respect to the More Sand and Moon Sand claims, the Government had contested the validity of these claims on the basis that they were located for a common variety of sand and did not contain a valuable mineral deposit. ^{4/}

^{4/} In support of his estoppel argument, appellant initially cited the concurring opinion of Justice O'Connor in United States v. Locke, 471 U.S. 84 (1985), in which she suggested that the Court's previous decisions would not necessarily preclude the application of the doctrine of equitable estoppel if the mining claimants reasonably relied on communications from BLM in making their annual filing required by 43 U.S.C. § 1744 (1982) one day after it was due. Inasmuch as Justice O'Connor was discussing equitable estoppel, her opinion has little to do with the question of whether the Government would be barred from litigating the same issue in other cases against different parties.

In his reply brief, appellant recognizes that he may have confused equitable estoppel with collateral estoppel. Nevertheless, he argues, in effect, that the Government is equitably estopped from denying the marketability of the sand on the Collins claims because the claimant and his predecessors-in-interest had relied on the decision concerning the More Sand and Moon Sand claims to their detriment.

Where the Government is to be estopped, there must be proof that the Government engaged in "affirmative misconduct," *i.e.*, either misrepresentation or concealment of material facts. In the present case, there is no evidence that the Government, at any time, suggested or concealed facts which indicated that the Collins claims themselves were considered to be valid. Furthermore, even if the patenting of the More Sand and Moon Sand claims could be regarded as "affirmative misconduct," in the circumstances of this case, appellant could not have relied on the patenting to his detriment. The material on the Collins claims has been properly found to be a common variety, so that their validity hinges on their status in 1955. The patenting occurred long after the July 1955 deadline for establishing validity imposed by the law and thus could not have affected the status of the claims at that time.

Thus, we can find no basis for holding that the Government should be equitably estopped to contest those claims and to ultimately declare them invalid if they are found to be located for a common variety of mineral and not supported by the discovery of a valuable mineral deposit prior to July 23, 1955.

In Forehand, Judge Rampton initially considered whether a valuable mineral deposit had been discovered on the claims prior to July 23, 1955. After considering all of the evidence presented by the Government, Judge Rampton concluded that it was "doubtful," considering the deficiencies in the Government's case, that the Government had established a prima facie case that a discovery had not been made prior to July 23, 1955, based on its assertion that sand from the claims was not marketable at a profit:

[The Government mineral examiner] never addressed himself specifically to the issue of discovery prior to the date in question. His testimony consists solely of observations as to the pit sizes, the evidence of recent work done, and of the type of material found upon the claims. He made no investigation as to possible sales or activity on the claims, either prior to or subsequent to [July 23], 1955. At best, his examination could be considered as an inspection of the material existing in the pits, the size of the pits, and an expert opinion that the material is a common variety.

(June 1975 Decision at 5, 6). Judge Rampton concluded that any prima facie case established by the Government, which he described as "bare bones," had been overcome by the uncontradicted evidence offered by the contestee that the claims had been actively mined since their inception and the sand removed and marketed at a profit. Id. at 14. In so concluding, Judge Rampton relied primarily on the testimony of the contestee and Hale C. Tognoni to the effect that the sand from the claims had been extracted, removed, and marketed at a profit prior to July 23, 1955.

Judge Rampton also indicated that it was doubtful that the Government had established a prima facie case that the sand was a common variety:

[The Government mineral examiner] not only admitted that he had no knowledge about actual uses of the material from the claims, but merely testified as to what uses he did know about and did not testify that in his opinion this material could not be used for purposes other than purposes for which common varieties of sand can be used. He made no comparison between the properties of the mineral on this claim with the properties of mineral from deposits of common varieties of sand. His experience in analyzing deposits of volcanic ash was admittedly limited to mining claims in the Flagstaff area and, further, most of his experience has been in the area of metallics and not in the area of nonmetallics.

Id. at 10. Judge Rampton ruled that, assuming the Government had established a prima facie case, the contestee had overcome that case with evidence that the sand has a unique property which gives it a distinct and special value. In so holding, he relied on the testimony of several of the contestee's witnesses to the effect that the unique properties of the sand primarily are that it is of lighter weight and will make concrete of higher strength than common varieties of sand, and that these properties in fact commanded a higher price in the market. Significantly, in Forehand, there was no Government evidence to the contrary on this question.

Judge Rampton held that the Government's contest complaint should be dismissed and patent should issue with respect to the More Sand and Moon Sand placer mining claims. No appeal was taken from this decision. Patent was subsequently issued.

In his decision concerning the Collins claims, Judge Sweitzer concluded that, until patent issues, the principle of collateral estoppel does not preclude the determination of the validity of an unpatented mining claim regardless of whether a similar claim was found to be valid and patent issued, citing United States v. Webb, 1 IBLA 67 (1970), aff'd, 723 F.2d 917 (9th Cir. 1983), cert. denied, 466 U.S. 972 (1984). We agree.

In administrative disputes within the Department of the Interior, the Secretary is not bound by actions taken by his subordinates. See Ideal Basic Industries, Inc. v. Morton, 542 F.2d 1364, 1367-68 (9th Cir. 1976). It necessarily follows that this Board, in exercising the Secretary's review authority, is not required to accept Forehand as precedent, as it was not appealed and was, therefore, not considered at the Secretarial level. See Udall v. Battle Mountain Co., 385 F.2d 90, 95 (9th Cir. 1967); Hiko Bell Mining & Oil Co. (On Reconsideration), 100 IBLA 371, 395, 95 I.D. 1, 14 (1988). Furthermore, so long as title to land remains in the United States, the Secretary of the Interior retains plenary authority to redetermine any issues relating to the validity of claims to that land. In the present case, because title to the land subject to the Collins claims remains in the United States, the Government, consistent with the holding in Webb and similar cases, is still entitled to contest the validity of the claims. 5/

It would not comport with the Department's obligation to adjudicate claims under the general mining laws to hold that the Government is collaterally estopped from challenging the validity of the subject mining claims on the basis of Judge Rampton's decision in Forehand, because that case was largely lost by the lackluster efforts of the Government. Judge Rampton's holding that the material in question was an uncommon variety was based on un rebutted testimony that the deposit was unique with respect to its "textural characteristics" and that the "deposit has a particular type of bedding or structure that makes it different from other ashes." The record also indicated that the material was "extremely high in silica content, and that the deposits would have a special value." In Judge Rampton's words, in Forehand, the Government presented only a "bare bones" prima facie case that was easily refuted by the claimant. In contrast, in the present case, the Government presented a far more substantial case, which deserves to be judged on its merits. The validity of a particular

5/ Appellant argues that Webb and similar cases are not applicable to the present case because the prior adjudication resulted in the passing of legal title from the United States. However, Webb and similar cases stand for the proposition that, so long as legal title to the mining claim which is subject to review has not passed out of the United States, the Government may still determine its validity, regardless of whether it has previously been determined to be valid or whether a comparable claim has been so determined and title to that claim has passed.

claim must be established by a showing that that claim, not some other claim, is supported by a valid discovery. See United States v. Kaycee Bentonite Corp., 64 IBLA 183, 223, 89 I.D. 262, 284 (1982); United States v. Duval, 53 IBLA 341, 346-47 (1981).

One significant difference is that, in Forehand, Judge Rampton cited unrebutted testimony characterizing the deposits as possessing pozzolan and similar material giving them 15 times the value of ordinary sand and gravel. ^{6/} There was unrebutted evidence in that record that the sand from those claims commanded a price of \$10 per yard, although the closest pits of common variety sand would sell for only \$6 to \$7 per yard delivered in Flagstaff. In contrast, the record here shows no such data and, to the contrary, indicates that the mountain sand was not a natural pozzolan and did not command a higher price than ordinary sand.

Judge Sweitzer considered this question:

Before concluding discussion on this issue, I feel compelled to comment on contestee's extensive evidence concerning the pozzolanic qualities of the Collins sand, qualities that the contestee contends give the sand distinct and special value (Ex. PPP).

Although contestee has run no tests on the Collins sand to determine its suitability as a pozzolan (Tr. 756), it claims that the sand "satisfies the chemical requirements for pozzolan" (Ex. PPP, P. 33). Contestee does not give a basis for this statement. In contrast, contestant produced test results indicating that the sand "has some slight pozzolanic characteristics, but not within the range that would qualify it * * * for use as a pozzolan in [Portland cement concrete]. Furthermore, the sand required some processing to exhibit the substandard pozzolanic properties (Tr. 324). * * * As pointed out by the Court of Appeals, Ninth Circuit, in McClarty, 408 F.2d at 909, the unique property must be present in the deposit in place, and not in the "fabricated or marketed product of the deposit."

(Decision at 14).

Furthermore, even if the material could be regarded as a natural pozzolan, the present record clearly demonstrates that no special value could be ascribed to it. The value of natural pozzolan as a reactive agent in making concrete has been effectively neutralized by the substitution of fly ash. Fly ash, a byproduct of the production of electricity by burning coal, is available in abundance at virtually no cost (Tr. 63-66). Thus,

^{6/} Pozzolan (also known as "pozzolana," "pozzuolana," and "pozzuolane") is defined as a "leucitic tuff quarried near Pozzuoli, Italy, and used in the manufacture of hydraulic cement. The term is now applied more gener-ally to a number of natural and manufactured materials, such as ash, slag, etc., which impart specific properties to cement. Pozzolan cements have superior strength at a late age and are resistant to saline and acidic solutions." Dictionary of Mining, Mineral, and Related Terms, at 856.

based on the present record, it is very doubtful that a claim for pozzolan, even if proven, would meet the common variety standard.

Thus, the evidence as to the nature of material found on the Collins claims did not establish that it is a pozzolan or that it would command a higher price than other sand. On these points, the case is clearly different from Forehand.

Having concluded that the questions of whether the sand encompassed by the subject mining claims is a common variety and was marketable at a profit prior to July 23, 1955, cannot be automatically decided on the basis of Judge Rampton's June 1975 decision in Forehand, we must resolve those questions as a substantive matter on the basis of the present record.

[2] We start with the question of whether the sand on the Collins claims is a common variety. Appellant's contention that the claims contain deposits of an uncommon variety of sand is based on the quality of the "primary sand" found on these claims. This material underlies the surface at varying depths and is covered with what appellant's witness termed "colluvium," a collection of soil and waste material he deemed to be inferior to the primary sand (Tr. 643-44). Appellant asserts that the primary sand must be considered apart from the overlying colluvium.

Although Judge Sweitzer concluded otherwise, we retain substantial doubt that the mountain sand (whether regarded as the primary sand by itself or mixed with the colluvium) possesses any unique characteristics. The record does not establish that the mountain sand performs substantially better than other sand. The Government presented evidence suggesting that the sand was actually inferior to ordinary sand, but appellant's evidence effectively rebutted the showing of inferiority. However, appellant's evidence fell far short of establishing that the mountain sand was superior in any way to ordinary sand, or even that it was significantly different from ordinary sand.

Even assuming arguendo (as Judge Sweitzer found) that this sand possesses unique characteristics, mere possession of a unique property is not enough to render the sand an uncommon variety. Rather, as Judge Sweitzer correctly held, the evidence must show that the unique property imparts a distinct and special value to the sand:

[T]he contestant established that the Collins sand is used only in the same kinds of applications as ordinary sand - in ordinary asphalt and [Portland cement concrete] structures. A series of tests run by two independent laboratories showed that the sand would perform marginally in these ordinary applications. The contestant's evidence with regard to selling prices (neither party offered evidence of cost comparisons) is somewhat tenuous. It does, however, show that the Collins sand does not command the higher price which would be expected for a material having special value. Thus, the Collins sand sells for approximately 50 cents per cubic yard (royalty) in a market that pays anywhere from 35 to

70 cents per cubic yard (royalty). [7/] In short, I find that the contestant's evidence constitutes a prima facie case in support of a conclusion that the Collins sand is a common variety.

The contestee's evidence established that the Collins sand, along with that on several other sand claims in the Sugarloaf Mountain area, has unique grain size, texture, and bedding characteristics. The contestee failed, however, to show that these unique properties give the sand special value for any kind of use. As the Board stated in the 1971 decision of United States v. Thomas: "Differences in chemical composition or physical properties are immaterial if they do not result in a distinct economic advantage of one material over another." 78 I.D. 5, 11 (1971). The contestee's only evidence on market prices supports the conclusion reached above: That, at best, the Collins sand commands a price within the range of prices paid for sand used for similar purposes. In summary, the contestee established that the Collins deposit does have unique properties. But it failed to show that these properties give the deposit the economic advantage required to establish the mineral as an uncommon variety. [Emphasis added.]

(Decision at 13-14).

Appellant generally challenges the Government mineral examiner's conclusions, arguing that he sampled the colluvium located above the primary sand, rather than the primary sand. The record, however, establishes that the Government mineral examiner sampled, tested, and assessed the material exposed on the claims (Tr. 35, 186-87, 197-98, 301, 316). As Judge Sweitzer correctly noted, the mineral examiner was not required to go beyond the exposed workings on the claims. See United States v. Clemans, 45 IBLA 64, 71 (1980), and cases cited therein. Thus, any failure to sample the correct material is properly traced to the claimant.

Appellant argues that he established that the Collins sand possesses seven unique physical and chemical properties which make the portland cement and asphaltic concrete products made from it of much higher quality and lower cost, such that it has commanded much higher prices than the common variety of sand. In particular, appellant notes that the sand

7/ Judge Sweitzer's conclusion is supported by the record. Testimony by the Government mineral examiner, which was based on his examination of the sand on the claims and information obtained regarding the local market for such sand, was to the effect that the sand would command at most a price of 50 cents per cubic yard, which was within the range of prices for sand (35 to 70 cents) (Tr. 62). Accordingly, he concluded that the sand did not have a distinct and special value and, thus, was a common variety (Exh. 19- 2). Appellant's contention that the mountain sand is worth more than shown by the Government is undercut by his admission that the "Collins claims product, Mountain Sand, is worth approximately 35 [cents] to 75 [cents] per ton in place since that is the net royalty to the owner" (SOR at 5). This value is within the demonstrated range of prices for common sand.

is lightweight; it also has an acceptable gradation of particle sizes, favorable particle shapes and surface textures, uniform physical features and chemical composition, an absence of deleterious particle coatings, natural pozzolanic quality, and natural air entrainment, appellant avers (Exh. RRR-15-16).

As noted above, we feel that the record does not bear out appellant's assertions. In any event, appellant tacitly admits that the sand does not have unique properties that render it usable for any extraordinary purpose, but argues that such properties render it usable "for ordinary purposes" (SOR at 5). ^{8/} The Department has consistently held that a deposit of sand and gravel suitable for all construction purposes, which may be superior to other deposits of sand and gravel found in the area because it is free of deleterious substances, and because of hardness, soundness, stability, favorable gradation, nonreactivity and nonhydrophilic qualities, but which is used only for the same purposes as other widely available, but less desirable deposits of sand and gravel is, nonetheless, a common variety of sand and gravel. United States v. Guzman, 18 IBLA 109, 125, 81 I.D. 685, 692 (1974).

Appellant claims that the sand on the Collins claims has "pozzolanic properties" imparting a distinct and special value to the sand (Appellant's Posthearing Opening Brief at 39; Tr. 210, 642-43; SOR at 12). As discussed above, the record does not support this conclusion.

We conclude that Judge Sweitzer properly determined that the sand encompassed by the Collins claims is a common variety under 30 U.S.C. § 611 (1982).

[3] The validity of the Collins claims, therefore, depends on whether the sand from the claims could be mined, removed, and marketed at a profit prior to July 23, 1955, and continuously thereafter.

Citing Edwards v. Kleppe, 588 F.2d 671, 673 (9th Cir. 1978), Judge Sweitzer concluded that the Government established a prima facie case that the sand from the Collins claims could not be profitably marketed prior to July 23, 1955. This showing was based on evidence that the average annual net value of recorded production from the claims totaled only approximately \$135 over a 10-year period ending in 1955, such that this value did not exceed annual expenditures for assessment work on the claims. ^{9/}

^{8/} Appellant asserts that, because of the higher price that the sand will command for such uses as opposed to ordinary sand, the sand is an uncommon variety. We find nothing in the record suggesting that the sand will command a higher price.

^{9/} The average annual net value of production was derived from Government Exh. 17, which was a summary compiled by FS of actual sales of material (as reported by appellant's predecessor in interest) made from the Collins claims during the period from April 1946 through December 1959. The total number of cubic yards sold and the price per cubic yard had been provided by the claimant, thus giving the gross value of production each year, which

The record does not establish whether the production was primary sand or colluvium. Thus, it might be argued that evidence of production through 1955 from the Collins claims is not sufficient to establish a prima facie case that the primary sand from the claims was not marketable at a profit prior to July 23, 1955, because the material produced was likely colluvium, which was, arguably, worth less than the primary sand. We agree with Judge Sweitzer that evidence that the value of the actual production from the claims over a 10-year period (regardless of whether it was primary sand or colluvium) did not exceed the cost of annual assessment work, let alone the cost of production, was sufficient to establish a prima facie case that the material from the claims was not marketable at a profit prior to July 23, 1955. See Edwards v. Kleppe, *supra* at 673; United States v. Zweifel, 508 F.2d 1150, 1156 n.5 (10th Cir.), *cert. denied*, 423 U.S. 829 (1975). The burden then devolved to appellant to establish that the primary sand was marketable at a profit.

Appellant seems to dispute that he is required to demonstrate that sand from the Collins claims was marketable at a profit prior to July 23, 1955. Thus, he first disagrees with Judge Sweitzer's holding, as paraphrased by appellant, that "reasonable continuous production for the last 30 years is not enough," and that a claimant "must demonstrate that this production was 'at a profit'" (SOR at 3). Further, in his posthearing reply brief to Judge Sweitzer, at page 23, appellant stated that "any challenge to the validity of a discovery should look to the present value of the deposit rather than those conditions that may have existed in 1955." However, the requirement to establish profitability prior to July 23, 1955, in the case of the location of a common variety of sand is an accurate statement of the law governing mining claims, as expressly approved by the Supreme Court in Coleman, *supra*, in 1968.

Judge Sweitzer recognized that, in accordance with Verrue v. United States, 457 F.2d 1202, 1204 (9th Cir. 1972), evidence of inadequate production from a particular claim cannot be a basis for invalidation of that claim if there is other evidence sufficient to prove the marketability of the mineral from the claim. He then noted that appellant had attempted to prove the marketability of the sand from the Collins claims prior to July 23, 1955, with evidence of the marketability of comparable production from other nearby claims during that time period. Although Judge Sweitzer agreed that the Collins sand was comparable to that produced from other local claims, he rejected the probative value of the evidence of other production because appellant failed to prove that others in the area successfully marketed this comparable sand and that, considering all costs, the net profit from production on the Collins claims would have been comparable

fn. 9 (continued)

ranged from \$1,320.15 to \$4,237.25. In the absence of any evidence regarding the costs of production and delivery of the material, FS determined the net value of production each year using a liberal hypothetical royalty value of 15 cents per cubic yard, even though studies had indicated that royalties averaged only "5 to 12 cents per cubic yard up to the early 60's and 15 to 25 cents up to now" (Exhs. 17-1, X-6). According to these numbers, the annual net value of production ranged from \$63 to \$265.

to that of the successful claimants, utilizing the analysis set forth in Melluzzo v. Morton, 534 F.2d 860, 863, 864 (9th Cir. 1976). See also Dredge Corp. v. Conn, 733 F.2d 704, 708 (9th Cir. 1984). In the absence of any other evidence of marketability, Judge Sweitzer concluded that appellant failed to establish by a preponderance of the evidence that the Collins sand was marketable at a profit prior to July 23, 1955.

In so ruling, Judge Sweitzer rejected evidence offered by appellant, consisting of records of production from the Collins and nearby claims prior to July 23, 1955 (Exhs. TT, XX, YY). On the basis of these records, appellant argued before Judge Sweitzer that the sand from the Sugarloaf Mountain area "has been marketable" (Tr. 685; Appellant's Posthearing Opening Brief at 24)). We do not doubt that large quantities of sand have been produced from the Sugarloaf Mountain area over time, including during the period prior to July 23, 1955, and that the sand, thus, has been marketable in the sense that there has been a demand for it. ^{10/} Nevertheless, the record does not show that this sand was marketed at a profit prior to July 23, 1955. See Mendenhall v. United States, 556 F. Supp. 444, 451 (D. Nev. 1982), aff'd, 735 F.2d 1371 (9th Cir. 1984), cert. denied, 469 U.S. 1209 (1985). At best, appellant has estimated the gross profits received by the various claimants on sales of the sand during this time period (Exhs. XX, YY). ^{11/} However, without sufficient evidence regarding the

^{10/} For purposes of our decision herein, we may accept appellant's figures regarding the extent of production from the Collins and nearby claims even though there are distinct problems regarding whether all of the reported production comes from these claims and whether all of the production was used for qualifying purposes. See United States v. Osborne, 28 IBLA 13, 25 (1976), aff'd sub nom., Bradford Mining Corp. v. Andrus, No. LV-77-218-HEC (D. Nev. Mar. 14, 1979). For example, even prior to July 23, 1955, there were significant restrictions on what constituted "sand," and sales of material for use as fill were not cognizable in determining whether a marketable deposit of sand was present on a claim. The records of production submitted by appellant do not reveal how the material removed was used (Exh. XX; Tr. 660). In addition, much of the production to which appellant refers was estimated based on the recollections of various persons and/or determinations of the amount of material that must have been removed owing to the size of the remaining pits and the supposed original topography of the area (Tr. 538-42, 573-74, 577-83, 585-87, 593-94). Finally, appellant's estimates are based largely on records of sales by the Pendergrass family, which fail to indicate the source of the sand sold. There are indications in the record that the Pendergrass family sold sand from sources other than the Sugarloaf Mountain area, some of which was shipped in by rail.

^{11/} We note that in an Oct. 4, 1972, study of whether the More Sand and Moon Sand claims contain a valuable mineral deposit (Exh. QQQ), Tognoni stated that sand from those claims could be mined and marketed at a profit in 1952. It was then selling for \$2.50/cubic yard, and the cost of production and sale was only \$1.75/cubic yard: "Average haulage costs in Flagstaff * * * were * * * \$1.20 [per cubic yard] for 20 miles from the pit to Flagstaff. Labor and overhead would easily be covered by 55 [cents] per cubic yard" (Exh. QQQ-36). However, the statements regard-ing the costs of production and sale were not corroborated by any evidence.

cost of production, it is impossible to discern whether the claimant actually received any net profit. 12/

In order to satisfy the marketability test, a mineral must be shown to be marketable at a profit. Where, as here, a claimant seeks to rely on comparable production, there must be proof not only that this other production was successfully marketed but that, given the particular costs of producing the deposit under review, production from this deposit would like-wise have been realized at a profit. Melluzzo, supra. It is this proof of profitability that is lacking from appellant's case. Appellant failed to establish that, even though the sand from the Collins claims was itself not produced in significant quantity or at a profit prior to July 23, 1955, it could, given the nature of the deposit and evidence of production from nearby claims, have been extracted and marketed at a profit. Thus, he failed to overcome by a preponderance of the evidence the Government's prima facie case that the sand from the Collins claims could not have been profit-ably marketed prior to that date.

As evidence of the profitability of his and surrounding mining ven-tures prior to July 23, 1955, appellant has, on appeal, submitted two affidavits signed by the widows of the two men who had owned the Collins and nearby patented sand claims during the period immediately prior to July 23, 1955. 13/ Appellant admits that these affiants "didn't do a sophisticated

fn. 11 (continued)

Nor are we convinced that Tognoni took into account all of the costs of extracting, processing, transporting and marketing the sand. In particular, there is no suggestion that he considered the cost of removing the overlying layer of colluvium found on the Collins claims, or that he discounted the percentage of non-sand contained in the material sold (Tr. 417-18), or the percentage of material sold for non-qualifying purposes, such as fill.

12/ Appellant appears to recognize that the record does not contain any probative evidence regarding the cost of production, arguing instead that Judge Sweitzer "erred in his decision that 'marketable at a profit' must contain all of the figures and costs of the production of over 100,000 tons of sand by * * * [various] people" (SOR at 16). Appellant explains: "Producers never make [an accountant's] analysis [of marketability], they just produce for a job and continue producing as long as they get paid, never stopping to pay costly accounting fees to see if they made a profit" (Reply Brief at 5). Unfortunately for appellant, in order to establish that the sand from the Collins claims was marketable at a profit prior to July 23, 1955, he must present evidence sufficient to overcome the Government's prima facie case of nonmarketability. As stated in United States v. Penrose, 10 IBLA 332, 335 (1973), "[i]t is the obligation of a mineral claimant to maintain adequate business records or other means of proof to support his contentions as to sales and marketability at a profit * * *."

13/ The affidavits are signed by Mrs. Orville (Hazel) Pendergrass, whose husband owned the Collins claims from 1946 through 1959, and Ms. Roberta (Forehand) McNelly, whose former husband owned the More Sand and Moon Sand claims from 1953 to 1960. In addition, appellant submitted the affidavits of Mrs. Melvin (Hilde) McCormick, whose husband produced sand in and

cost analysis to meet [the] demand for a documented profit," and that, at best, they are only able to testify to the fact that they derived a profit from their ventures "sufficient * * * to continue operating their business and making a living" (SOR at 4). In view of this, appellant asserts that it is "unfair and inconsistent with the purposes of the mining law" to invalidate his claims where he "can't prove that [the] Collins [sand, from either the Collins or nearby claims, was] marketed at a profit from 1932 to 1955." Id. at 12.

Evidence submitted for the first time on appeal following a hearing will only be considered by the Board for the limited purpose of deciding whether to order an additional hearing. See 43 CFR 4.452-9; United States v. Lutey, 76 I.D. 37, 41 (1969). In order to be entitled to a further hearing, appellant must first explain why the affidavits were not submitted at the hearing. See United States v. MacIver, 20 IBLA 352, 358 (1975). Without an explanation, the Board may properly disregard such evidence.

There is no doubt that appellant had every opportunity to present such evidence at the hearing. In addition, Judge Sweitzer afforded appellant an additional opportunity to submit such evidence. Thus, as he noted at page 16 of his decision: "Although several persons with first-hand knowledge relevant to the pre-1955 discovery issue are alive, neither party produced their testimony. (See, e.g., Tr. 363 where provision was made to take depositions of such persons, but no such depositions were ever filed.)" (Emphasis added.)

Appellant has not explained his failure to offer the testimony of the affiants prior to his appeal to the Board. He argues that the affidavits are intended to support the validity of the already-introduced reports of production from the Collins and nearby claims prior to July 23, 1955. Thus, he contends that the affidavits are "only supplementary to the appellant's brief and not new evidence" (Reply Brief at 3).

The affidavits are clearly new evidence. While they may serve to corroborate evidence already in the record, they were not made available to Judge Sweitzer prior to his decision. Accordingly, appellant was required to provide an explanation for his failure to submit the testimony of the affiants at any time prior to his appeal. Appellant has offered no explanation. It is, therefore, proper to exclude the affidavits from consideration by the Board.

Furthermore, no hearing will be ordered where there is no indication that a different result might obtain even if the evidence were introduced

fn. 13 (continued)

around the Collins claims, Mrs. Roy (Estella) Kincanon, whose husband owned the Kincanon claim which produced rock and B. B. Bonner, Jr., who produced sand in and around the Collins claims starting in 1934. The latter three persons attested to the fact that Mrs. Pendergrass and Ms. McNelly had virtually the only records of production, but that an active market for sand from the Collins and nearby claims had, nevertheless, existed prior to July 23, 1955.

into the record and then considered. See United States v. Syndbad, 42 IBLA 313, 322 (1979), aff'd, No. 80-203-PHX-CLH (D. Ariz.), aff'd, No. 82-5324 (9th Cir. Apr. 6, 1983). That is the situation here, because the affidavits submitted by appellant do not establish that sand from either the Collins or nearby claims was either marketed or marketable at a profit prior to July 23, 1955, sufficient to overcome the Government's prima facie case that the sand was not marketable at a profit at that time. At best, as appellant admits, the affiants only state that they "made all or part of [their] living [during the period from 1932 to 1955] * * * selling mountain sand" (SOR at 12). As appellant further states, "affiants' profit was that they were supported by th[eir] activity" (Reply Brief at 4).

There must be some proof not only of the sales price for the sand, but also of the costs of production during the relevant time period. There must be some evidence to show that the material was being marketed or was marketable at a profit from these claims prior to July 23, 1955. Evidence of sales from the nearby claims is insufficient by itself to establish the profitability of production from the Collins claims. Rather, there must be evidence that these other operations were themselves profitable and that production from the Collins claims would likewise have been profitable. See Melluzzo v. Morton, supra at 863, 864.

Thus, we are not persuaded that we should order a further hearing so that the affidavits may be introduced into the record. As they shed no light on the profits obtained or obtainable from sales of the Collins sand prior to July 23, 1955, they suffer from the same defects which Judge Sweitzer found in the evidence already in the record.

In view of our conclusion that appellant did not overcome the Government's prima facie case that the sand from the Collins claims was a common variety under 30 U.S.C. § 611 (1982) and that it was not marketable at a profit prior to July 23, 1955, we conclude that Judge Sweitzer properly invalidated appellant's claims. Therefore, we need not consider any of the other issues raised by this proceeding, viz., whether the Collins claims continued to be supported by the discovery of a valuable mineral deposit following July 23, 1955, and whether the amended notices of location of these claims filed in 1966 were actually relocations of the original 1938 claims.

Therefore, 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.

David L. Hughes
Administrative Judge

I concur:

Wm. Philip Horton
Chief Administrative Judge