

UNITED STATES

v.

E. M. JOHNSON ET AL
APR 2 1965

A-30191

Decided

Mining Claims: Contests--Mining Claims: Determination of Validity

The Department of Interior has authority and jurisdiction to contest mining claims on the ground that they are invalid because of a lack of a discovery of a valuable mineral deposit, regardless of whether or not any other use for the land is sought or alleged by the Government or whether an application for a mineral patent has been filed.

Administrative Procedure Act: Adjudication--Administrative Procedure Act: Decisions--Administrative Procedure Act: Hearings--Mining Claims: Contests

Where a hearing examiner in his decision in a Government contest proceeding against a mining claim cites Interior Department decisions in concluding that the mineral values on the claim are insufficient to support a discovery of a valuable mineral deposit, the decisions are not evidence or testimony but are merely examples of other applications of standards applied, and, therefore, there is no violation of section 7 of the Administrative Procedure Act which requires that decisions be predicated upon the record made at the hearing.

Administrative Procedure Act: Generally--Administrative Procedure Act: Decisions--Administrative Practice

Although Departmental decisions may not be included in the volumes published as Decisions of the Department of the Interior, they may be cited as precedents in proceedings under the Administrative Procedure Act since they are available for public inspection pursuant to published Departmental regulations, which is in accordance with section 3 of that act.

Mining Claims: Common Varieties of Minerals

Limestone used as rubble in building construction having no distinct or special properties giving it special value and indistinguishable from limestone found in many other areas is a common variety of mineral within the meaning of the act of July 23, 1955, and hence not locatable after that act, regardless of the fact that a limited amount of 45 tons of the material has been sold for use in construction.



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

A-30191

United States

v.

E. M. Johnson et al.

: California Contest No. 6976

: Placer mining claim

: declared null and void

: Affirmed

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

^{1/}
E. M. Johnson and others have appealed to the Secretary of the Interior from a decision, dated October 14, 1963, by the Acting Assistant Director, Bureau of Land Management, affirming a hearing examiner's decision of February 20, 1963, declaring the Ell Placer Mining Claim, located by Johnson and others in the SW $\frac{1}{4}$ sec. 28, T. 32 S., R. 38 E., M.D.M., California, to be null and void for lack of a discovery of a valuable mineral deposit within the meaning of the mining laws.

Contest charges were brought against the mining claim by the Bureau of Land Management on two grounds. The first ground, that the land embraced within the claim is nonmineral in character, was not ruled upon by the hearing examiner or by the Acting Assistant Director. The second ground was that minerals had not been found within the limits of the claim in sufficient quantity to constitute a valid discovery. This charge was sustained by the hearing examiner after a hearing was held, and by the Acting Assistant Director on appeal from the examiner's decision.

The appellants have incorporated their contentions before the Director in this appeal. Most of these contentions were adequately answered in the decision of October 14, 1963, and only some of them will be discussed briefly. The appellants attacked the authority of the Bureau to initiate the contest since they had not filed patent applications and since no reason was shown that there was any other use desired for the land within the claims, other than that public sale applications had been filed. This contention was completely answered by the United States Court of Appeals for the Ninth Circuit in discussing a similar contention raised by the same attorney as the one representing appellants here, in Davis v. Nelson 329 F. 2d 840 (9th Cir. 1964). The same contention has also been answered by the Department in United States v. Anita E. Spurrier et al., A-29306 (October 21, 1964), and United States v. Lewis Reece et al., A-30037 (October 21, 1964).

^{1/} The appeal has been taken in behalf of Johnson and other claimants to the Ell Placer Mining Claim. In addition to Johnson, the claimants listed in the complaint are: William Kluss, Sr., Florence A. Berg, Ernest S. Fisher, Dale Nagel, John Fife, Pauline Fife, and Emmett Strickland, Jr.

The appellants contend that there was both individual and departmental bias in conducting this contest proceeding. The decision below discussed this contention and the factual circumstances in some detail. It is only necessary to re-emphasize that appellant has not shown by any facts or by any legal argument that the hearing was improper or that the hearing examiner was not qualified. Objections similar to some of those raised by the appellants regarding the qualification of the hearing examiner under the Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C. § 1001 et seq. (1958), and his relationship to other employees in this Department, have been raised in other cases. In United States v. Keith V. O'Leary et al., 66 I.D. 17 (1959), and in United States v. Thomas R. Shuck et al., A-27965 (February 2, 1960,^{2/} it was concluded that the procedure followed by this Department in the initiation, prosecution and deciding of contests in mining cases was in compliance with the Administrative Procedure Act, particularly with the requirements of section 5 relating to the separation of such functions in decision making, 60 Stat. 239, 5 U.S.C., § 1004 (1958). It was especially noted that Bureau of Land Management hearing examiners are appointed in accordance with the requirements made by the Civil Service Commission and with section 11 of the Administrative Procedure Act, 60 Stat. 244 (1946), 5 U.S.C. § 1010 (1958).

However, appellants' attorney contends, nevertheless, that the hearing examiner was "not unbiased". He argues that he had attempted to question the hearing examiner on this matter but was not permitted to do so. At the hearing the attorney did ask the hearing examiner to "express his experience on the manner in which he was employed" and also what instructions the Bureau of Land Management had given him concerning the handling of the contest. The examiner responded by saying that his qualifications had been examined in great detail by the Civil Service Commission prior to his appointment in 1956 and he could see no reason for reviewing them there. He did state that he had never been instructed by the Bureau of Land Management to issue a decision one way or the other and that he had ruled both ways on many occasions. This colloquy is set forth on pages 3 and 4 of the transcript of the hearing (Tr. 3 and 4).

I believe the examiner's answer to be adequately responsive to the questions raised. He indicated that his appointment came through the Civil Service. It was not necessary for him to detail the steps he took or the qualifications which the Civil Service Commission required of him before he was appointed as a hearing examiner. Appellants have not asserted that the hearing examiner engages in other functions in

^{2/} Shuck sued a Bureau of Land Management employee after this decision, but summary judgment was rendered for the defendant on December 7, 1961, and no appeal was taken, Shuck v. Helmandollar, Civil No. 682 Pct., U.S. Dist. Ct. for the District of Arizona.

the Department apart from his duties as a hearing examiner which could disqualify him. The examiner's statement that he had not been instructed with respect to the case in light of the question which was posed to him was certainly a response that he had no pre-determined judgment in the matter.

Appellants attempt to make a case of bias on the basis of the examiner's refusal to say more in that respect, and by the fact that he decided the case against them. They state that the examiner's bias is shown by an analysis of his decision which reveals that all the contestees' testimony and evidence was completely discounted in favor of that presented by the contestant's witnesses. Of course, appellants' rationale here that the hearing examiner gave more weight to some witnesses than to others in making his findings of fact and conclusions and thus must be biased, could be applied in any type of proceeding where evidence must be considered and evaluated. It obviously has no merit.

In considering this appeal the record has been reviewed both as to matters of fact that are revealed and as to the legal questions raised. The important questions which are raised are whether the facts that were found are supported by the record and whether the conclusions of law that were drawn therefrom are correct.

Among minerals for which the claim is alleged to be valuable are gold, silver and mercury. The hearing examiner ruled that the values of these minerals which had been shown at the hearing were insufficient to warrant a prudent man to invest his time and money in the hope of developing a paying mine. The hearing examiner stated that the highest assay value found by contestant's witnesses of gold was 1.5 cents per ton ^{3/} and that assays of samples taken by the contestees showed an average value of approximately \$.42 per ton for gold and \$.11 per ton for silver. He found that the negligible amount of silver present had practically no value and that no appreciable amounts of recoverable mercury were shown to be present.

Appellants attempt to find error in the examiner's decision because of his statement that, assuming that there were materials containing \$.42 per ton of gold on the claim, this would be insufficient to satisfy the Castle v. Womble prudent man rule because the Department had ruled invalid many claims on which that amount of gold was present, citing United States v. Robert W. Carnes, A-28178 (May 23, 1960);

^{3/} The examiner erred in giving the 1.5 cents as the value per ton. The summary given earlier in the examiner's decision showed that Fred S. Boyd, Jr., the contestant's witness, testified to a value of 1.5 cents per cubic yard. A yard is $1\frac{1}{2}$ tons (Tr. 61).

United States v. Eric North, A-27936 (July 1, 1959); and United States v. Alonzo A. Adams et al., A-27364 (July 1, 1957). Appellants contend that this statement shows a violation of two different sections of the Administrative Procedure Act.

First, it contends that section 7 of that act, 60 Stat. 241 (1946), 5 U.S.C. § 1006(d) (1958), is violated if this is an administrative rule that claims bearing 42 cents per ton or less of gold are invalid, since that section requires the decision to be made upon the record made at the hearing. The point that appellants seek to make is not clear. In any event, the hearing examiner did not rely on any evidence or testimony outside of the record. In citing the Departmental decisions, he simply cited them as examples substantiating his conclusion that the facts supported a finding of no discovery of a valuable mineral deposit. The statement must not be viewed alone but must be considered in the entire context of the decision. It is apparent that all of the evidence which was presented was given consideration. It is also apparent that there has not been any absolute standard established as to what the value per ton of gold must be as it is clear from the cited cases and from the testimony of witnesses by both parties at this hearing that other factors such as the amount of overburden to be removed, the availability of transportation facilities, etc. are to be weighed in determining the value of a claim.

Secondly, the appellants contend that use of the cited decisions was in violation of section 3 of the Administrative Procedure Act, 60 Stat. 238 (1946), 5 U.S.C., § 1002(b) (1958), in that section 3 requires publication of cases used as precedents and that the decisions cited were unpublished. Section 3 provides in pertinent part as follows:

"Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules."

Although the cited decisions were not included in the volumes of selected decisions published in Decisions of the Department of Interior (I.D.'s), by published regulation, in effect when the hearing examiner's decision was rendered, copies of decisions rendered by this Department, including those cited by the hearing examiner, are available for public inspection in various Departmental offices. See 43 CFR 2.5. This procedure complies with the above-quoted provision of the Administrative Procedure Act. Appellants have not asserted that the decisions cited were not available for such inspection; thus their contention in this respect is frivolous.

Also frivolous is appellants' contention that the hearing examiner applied an erroneous standard because in several places in his decision he referred to the test of discovery as what a "prudent man" would do even though he cited and stated the test as given in Castle v. Womble, 19 L.D. 455 (1894), as being whether a man of "ordinary prudence" would expend further time and money "with a reasonable prospect of success" in developing a paying mine. Thus the United States Circuit Court of Appeals for the 9th Circuit, in upholding the Department's decision in the Adams case, supra, noted that a contention regarding the discrepancy in language between "prudent man" and man of "ordinary prudence" was simply frivolous. Adams v. United States, 318 F. 2d 861, footnote 7 (1963).

Appellants contend, in addition, that the hearing examiner erred in applying the standard to be used and that he premised his decision upon an assumption that it is necessary to demonstrate that the mineral deposit can be worked at a profit. They allege that they would have to show that costs of extraction would be less than contained mineral values and that the quantities of mineral values exposed would be sufficient to amortize the cost of equipment to make the extraction and that this is contrary to the Castle v. Womble standard. In reviewing this case it does not appear that the hearing examiner made any erroneous assumptions and evaluated the evidence on improper standards. Instead, it appears that the following statement made by the Court in the Adams case, supra, at 870, is relevant here with regard to application of the Castle v. Womble test:

"In applying this test evidence as to the cost of extracting the mineral is relevant * * *. The agency properly considered this evidence, not to ascertain whether assured profits were presently demonstrated, but whether, under the circumstances, a person of ordinary prudence would expend substantial sums in the expectation that a profitable mine might be developed."

Thus consideration of the costs of mining is relevant as well as consideration of the quantity of mineral which has been exposed upon the claim, in determining whether the requirements of a discovery of a valuable mineral deposit within the meaning of the mining laws have been met.

In addition to the minerals previously mentioned, the appellants contend that the mining claim is valuable for limestone which a lessee of the claimants has marketed and sold as a building material under the trade name "Castle Rock". The decisions below, however, noted that the mining claim was located on September 17, 1957, and that the limestone is of a common variety and hence was not locatable at that time in view of the act of July 23, 1955, 69 Stat. 367, 30 U.S.C. § 601 (1958).

Section 3 of that act provided at the time the appellants attempted to locate their claims ^{4/}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: Provided, however, That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. '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 * * *"

The pertinent regulation provides that:

"'Common varieties' includes deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. Mineral materials which occur commonly shall not be deemed to be 'common varieties' if a particular deposit has distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation. * * *" 43 CFR 3511.1(b).

Appellants contend that the limestone was a locatable mineral because it has special properties which made it commercially valuable. They state that there are three and one-half million tons in the deposit within the claims, that the limestone has a selling price of \$16.00 a ton, that the cost of delivery is \$6.50 a ton with the cost of mining \$1.50 per ton, and that thus it is commercially valuable. During an 18-month period in which the claim had been leased, the lessee sold 45 tons of the material to one company (Tr. 132, 133). As shown by Contestees' Exhibit S, 25 tons were sold at \$16.00 per ton on January 25, 1962, and by Contestees' Exhibit T, 20 tons were sold on February 12, 1962, for \$12.00 per ton. The wholesaler sold the material to a stone contractor who used the material in new homes (Tr. 104). He indicated that all the materials taken from the claim were rubble (Tr. 122), but that of the estimated 3.5 million tons of the limestone "ore", 20 to 25 per cent would be three feet in diameter or larger (Tr. 107).

^{4/} An amendment by the act of September 28, 1962, 76 Stat. 652, 30 U.S.C. § 611 (Supp. V, 1964), is not relevant here.

A witness for the contestant, a qualified mining engineer, testified that the limestone material is useful only as rubble, that it has wide occurrence and is similar in formation to limestone deposits in other areas, and that it does not have special distinctions or characteristics (Tr. 28, 29, 43, 44). He took samples of the building stone material to nine retail stone dealers in the Los Angeles and Bakersfield areas of California (Tr. 37), but none of them were interested in buying it (Tr. 38). Some of the dealers estimated that the material might sell for \$10 to \$15 a ton wholesale delivered to the dealer (Tr. 39), but many of them were not interested because they thought the material was too common (Tr. 40).

This evidence and other evidence in the record show that although two sales were made of the material, they were made to one company and were of a limited tonnage, and that it is extremely doubtful that there is much of a market for the material. It also shows that the material is primarily useful as rubble and that it is lacking in qualities and characteristics which would set it apart as a material having a distinct and special property, as required by the afore-quoted statute and regulation. It was used for ordinary building purposes. Thus, the record supports the hearing examiner's conclusion that the material is of a common variety.

Appellants contend that the interpretation of the act of July 23, 1955, was incorrect, alleging that the material does have commercial value. A demonstration that a mineral deposit has commercial value does not establish that it is not of a common variety. A common variety of mineral may well have commercial value. There must in addition be a showing that the deposit in question has qualities which give it a distinct and special value. Thus, it has been held that although a building stone has unique physical properties it is not an uncommon variety where the unique properties do not give it special value for use as a building stone. United States v. Kenneth McClarty, 71 I.D. 331 (1964); see also United States v. Kelly Shannon et al., 70 I.D. 136 (1963).

After having reviewed the record in light of the appellants' contentions, we conclude that the legal interpretations and standards which were applied in the decisions below are correct, and that the findings of fact which were made are supported by substantial evidence in the record.

A-30191

Accordingly, 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 decision appealed from is affirmed.

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