

INTERIOR BOARD OF LAND APPEALS

United States

v.

Arizona Tufflite, Inc., successor-in-interest to Multiple Use, Inc.

144 IBLA 385 (June 26, 1998)

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UNITED STATES OF AMERICA

v.

ARIZONA TUFFLITE, INC.,
successor-in-interest to
MULTIPLE USE, INC.

IBLA 94-405

Decided June 26, 1998

Appeal from a decision by Administrative Law Judge Ramon M. Child dismissing a contest of the validity of the White Vulcan No. 2 placer mining claim. AZ MC 28246-1 and IBLA 88-403.

Affirmed as modified.

1. Administrative Procedure: Administrative Law Judges--Administrative Procedure: Hearings--Hearings

When the Board of Land Appeals remands a case to an administrative law judge, the administrative law judge may expand the scope of his review, unless specifically prohibited by the remanding decision, if either party tenders an offer of proof sufficient to permit him to conclude that, if established, the facts tendered would compel a reversal of his previous findings of fact. When a party tenders an offer of proof and the administrative law judge concludes that the offer of proof is not sufficient to compel expanding the scope of the hearing, this Board will not overturn that decision without a clear showing of error.

APPEARANCES: Patricia Leigh Disert, Esq., Office of the General Counsel, U.S. Forest Service, Albuquerque, New Mexico, for the United States; Douglas G. Martin, Esq., Phoenix, Arizona, for Arizona Tufflite.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Arizona Tufflite, Inc. (Arizona Tufflite), successor-in-interest to Multiple Use, Inc. (Multiple Use), has appealed a May 18, 1994, Decision

issued by Administrative Law Judge Ramon M. Child. ^{1/} In his decision, Judge Child dismissed the proceedings in the above titled hearing on the grounds that the U.S. Forest Service, Department of Agriculture (Forest Service), had failed to present a prima face case as to the lack of a discovery of pumice on the White Vulcan No. 2 mining claim, granted dismissal based on an Arizona Tufflite "Motion for Involuntary Nonsuit or Dismissal," and denied the Contestee's "Motion for Further Hearing; Tender of Offer of Proof."

An outline of the history of this case is necessary for an understanding of Judge Child's Decision and the resulting appeal. On July 31, 1953, eight individuals located the White Vulcan No. 2 claim as a 160-acre association placer claim. As located, the White Vulcan No. 2 included the SE¹/₄ of sec. 19, T. 23 N., R. 8 E., Gila and Salt River Meridian, Arizona. Following a number of conveyances the claim was purchased at a sheriff's sale by Mineral Trust Corporation and conveyed to Mineral Services Corporation (Mineral Services). Mineral Services filed a patent application with the Bureau of Land Management (BLM) on November 1, 1978. An amended mineral patent application was filed on October 23, 1981.

Generally, the geology at the site consists of a relatively thin layer of overburden, under which there is a deposit of pumice containing material described as having been "reworked." This layer or bed contains pumice and other materials, such as scoria, tuff, mudflow, clay, and fine material, which were deemed to have a deleterious effect on the value of the contained pumice. Below this layer is a layer or bedded deposit about 20 feet thick containing largely unadulterated "air-fall" pumice. In its amended application Mineral Services described the valuable mineral on the claim as "popcom" pumice, because the pumice occurs on the claim in the form of rounded nodules.

On May 7, 1982, BLM issued a Mineral Entry Final Certificate and held the claims for patent. However, final approval of the application was withheld pending a field examination and mineral report. On October 26, 1982, a Forest Service Mineral Examiner commenced a mineral examination of the claim. He prepared a report of his findings and stated his opinion that the land was nonmineral in character and no discovery existed within the confines of the claim.

The Forest Service then initiated a proceeding contesting the validity of the claim by issuing a complaint which was served on Mineral Services on October 18, 1985. ^{2/} A hearing, held in Phoenix, Arizona, on

^{1/} On May 27, 1994, Judge Child issued an errata correcting one word in his May 18 Decision.

^{2/} Technically, mining claim contest proceedings are initiated by BLM on behalf of the Forest Service. The Forest Service actively sought issuance of the complaint, its expert witnesses were either employees of or consultants to the Forest Service, and its counsel is an employee of the Forest Service. Mineral Services, the owner of record when the complaint was issued, is a wholly owned subsidiary of Multiple Use. Multiple Use subsequently assumed the defense, and was substituted as the named party.

October 27 through 31, 1986, was adjourned, and a further hearing was held on January 12 through 16, 1987. Following extensive briefing which continued through August 12, 1987, Administrative Law Judge Harvey C. Sweitzer issued his Decision on March 25, 1988. ^{3/}

In his Decision, Judge Sweitzer made the following findings which are pertinent to this appeal:

A discovery of a valuable mineral deposit of uncommon variety pumice exists on the White Vulcan No. 2 placer mining claim because its unique properties (uniform size, absence of staining material) give it a special and distinct value (premium price) for stone washing over other ordinary domestic pumice deposits. However, [the N¹/₂ of the NW¹/₄ of the SE¹/₄, the E¹/₂ of the SE¹/₄, and the S¹/₂ of the SW¹/₄] are nonmineral in character * * *.

Furthermore, because any discovery that might have been made prior to October 31, 1957, was subsequently lost, a qualifying discovery was not made until after the claim devolved to a single entity, and the claim known as White Vulcan No. 2 must be limited to no more than 20 acres (two regular and contiguous 10-acre parcels). The two parcels may be selected by contestee from [the S¹/₂ of the NW¹/₄ of the SE¹/₄ and the N¹/₂ of the SW¹/₄ of the SE¹/₄]. Upon selection * * * the claim may go for patent, all else being regular.

(Judge Sweitzer's Decision at 51.)

The Forest Service and Multiple Use appealed Judge Sweitzer's Decision to this Board. Following extensive briefing, we issued United States v. Multiple Use, Inc., 120 IBLA 63 (1991), affirming Judge Sweitzer's decision as modified, and remanding the case to the Hearings Division for a further hearing. Specifically, we made the following findings:

As to the issue of the existence of a discovery on the claim, we find Judge Sweitzer's determination that * * * the White Vulcan No. 2 claim contains an exposure of pumice suitable for use as a stone-washing abrasive is supported by the record, and the Forest Service has made no offer of any evidence that, if established, would have compelled a reversal on this point. We find his conclusion that a prudent person would expend his time and means in the further development of the White Vulcan No. 2 claim with a reasonable probability that a successful mine could be developed when the stone-washing quality pumice is sold in El Paso, Texas, for 8 cents a pound is supported by the record, and the Forest Service has made no offer of any evidence that, if established, would have compelled a reversal on this point.

^{3/} The record consisted of 1,700 pages of transcript and over 100 hearing exhibits. Following the hearing the parties submitted over 120 pages of posthearing briefs. Judge Sweitzer's opinion ran more than 50 pages.

Notwithstanding the above findings, we find ourselves in a position similar to that we found ourselves in when rendering the first decision in United States v. Pittsburgh Pacific Co., 30 IBLA 388, 84 I.D. 282 (1977). There is one narrow point with sufficient impact to cause us to remand this case for further consideration. There is no question that the record is sufficient to support dismissal of the contest if no patent application were pending. See United States v. Lewis, 58 IBLA 282 (1981). However, as noted previously, when the record does not contain sufficient evidence on an essential issue to persuade the Secretary or his authorized officers that the law has been met, the Department cannot legally grant a mineral patent. United States v. Higbee, *supra*; United States v. Hooker, 48 IBLA 22, 27 (1980); United States v. Pittsburgh Pacific Co., 30 IBLA 388, 84 I.D. 282 (1977). The record on the issue of discovery is lacking in one respect. Judge Sweitzer based his determination on Morgan's un rebutted testimony that his company was operating under an oral contract for the sale and purchase of two truckloads of stone-washing quality pumice a week at 8 cents a pound. Morgan further testified that he made one shipment of pumice under that contract. Our concern is that, because the purchase and sales agreement is an oral contract, it is terminable at will, and the single shipment (or small number of shipments) may represent an isolated sale of White Vulcan pumice at a premium over and above the price paid for common variety pumice.

We are unable to determine whether the sale and shipment of pumice described by Morgan represents a regular market for the stone-washing grade pumice at 8 cents a pound or higher, or an isolated transaction. See United States v. Slater, 34 IBLA 31, 37 (1978); United States v. Boyle, 76 I.D. 318 (1969), *aff'd*, Boyle v. Morton, 519 F.2d 551 (9th Cir. 1975), *cert. denied*, 423 U.S. 1033 (1975); United States v. Estate of Denison, 76 I.D. 233 (1969). We would have no difficulty dismissing the contest if a patent application were not pending, but one is and we are unable to adequately discern the extent of the potential for continued sales of stone-washing pumice from the White Vulcan No. 2 claim at a price which is sufficient to support a conclusion 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. We therefore find it necessary to remand the case for the tender of further evidence on that issue. 65/

65/ Notwithstanding the narrow scope of this remand, Administrative Law Judge may expand the scope of his review in the event that either party tenders an offer of proof sufficient to permit him to conclude that, if established, the facts tendered would compel a reversal of his previous findings of fact. See Ideal Basic Industries, Inc., v. Morton, 542 F.2d 1364 (9th Cir. 1976); United States v. Pittsburgh Pacific Co., 68 IBLA at 3342, 89 I.D.

at 586. It is equally within the scope of his authority to limit the scope of the hearing if no offer of proof is tendered or, if tendered, he is not convinced that the facts would compel a reversal of his prior decision.

United States v. Multiple Use, Inc., *supra*, at 124-25.

We concluded our decision stating:

We affirm Judge Sweitzer's finding that the preponderance of the evidence supports findings that: (a) no discovery of valuable mineral existed on the claim on October 31, 1957; (b) there was no discovery of valuable locatable mineral on either claim when the ownership passed to a corporate entity capable of holding more than 20 acres in any one mineral claim. Therefore, we affirm his holding that Multiple Use would be required to select 20 regular and continuous acres from among the 10-acre tracts that are mineral in character.

By reason of our amendment of his decision, we hold that Multiple Use would be able to select the 20-acre parcel from land identified as tract Nos. 17, 18, 22 through 26, and 32. ^{76/} Multiple Use is cautioned, however, that at least one of two tracts must be chosen from among parcels 23 through 26, as the discovery lies in those tracts. If, for example, parcels 17 and 18 were selected, there would no longer be an exposure of mineral within the boundaries of the claim and it would no longer be valid.

We agree with Judge Sweitzer's finding that the preponderance of the evidence supports a conclusion that an uncommon variety of pumice exists on the White Vulcan No. 2 mining claim; and that the preponderance of the evidence presented supports a finding that there is a discovery of valuable locatable mineral on the White Vulcan No. 2. As noted previously, we would have no difficulty dismissing the contest if a patent application were not pending, but one is and we are unable to adequately discern the extent of the potential for continued sales of stone-washing pumice from the White Vulcan No. 2 claim at a price which would allow us to conclude 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. We therefore find it necessary to remand the case for the tender of further evidence on that issue.

^{76/} Tract 19 is not contiguous to tract 23, 24, 25, or 26, and therefore is not available for selection.
[4]

^{4/} In the 1987 hearing, the parties described the various portions of the claims by dividing them into 32 equal tracts containing 10 acres each.

United States v. Multiple Use, Inc., *supra*, at 135.

Upon issuance of our decision in United States v. Multiple Use, Inc., *supra*, the case file was returned to the Hearings Division for further action in accordance with our holding. The case was reassigned to Judge Sweitzer, who sought agreement as to the issue or issues to be considered in the hearing. Failing to achieve an agreement, on April 9, 1992, Judge Sweitzer directed the parties to provide written submittals and arguments regarding the issues to be addressed at the hearing.

In response, counsel for the Forest Service stated that her interpretation of the remand statements made on pages 124, 125, and 135 of our decision (and quoted above) included

several sub-issues: 1) the potential for continued sales of White Vulcan #2 pumice for use as a fabric conditioner, 2) the prices paid on a regular basis by fabric conditioning companies for pumice sold by Multiple Use Corporation and other pumice suppliers, 3) the present cost of mining, preparing and shipping pumice from White Vulcan Mine #2, and 4) whether a person of ordinary prudence would be justified in concluding, based on the cost, marketability and price, that a successful mine could be developed.

(Forest Service letter of April 30, 1992, at 1.) Paraphrasing the 65th footnote in our decision counsel urged a further expansion of the scope of the hearing, stating:

The Appeal Board has formally authorized you to enlarge the scope of this remand "in the event that either party tenders an offer of proof sufficient to permit [you] to conclude that, if established, the facts tendered would compel a reversal of his previous findings of fact." (Appeal Decision, page 125, footnote # 65.)

The Forest Service then offered to present scientific analysis performed during 1991 and 1992 to illustrate the quality of pumice in the White Vulcan Mine and demonstrate that it is not an uncommon variety of pumice.

In response to Judge Sweitzer's request, counsel for Multiple Use stated that

[t]he only issue the IBLA left for " * * * tender of further evidence" was to " * * * discern the extent of the potential for continued sales of stone-washing (fabric finishing) pumice from the White Vulcan No. 2 claim at a price which is sufficient to support a conclusion 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." 120 IBLA 125, lines 3 through 9 (parentheses added). This evidence is as follows:

1. Records of sales of fabric finishing (stone washing) pumice from the White Vulcan No. 1 and White Vulcan No. 2 association placer mining claims.
2. October 1991 Aerial photo map showing White Vulcan mining operations.
3. Continuing market testimony * * * on the conditions of the national and international market for fabric finishing with pumice.
4. Arizona Tufflite's Sales Brochure.

(Multiple Use May 12, 1992, Tender of Further Evidence at 1-2.)

Multiple Use also sought the introduction of additional evidence, based on footnote 65. It urged expansion of the scope of evidence to include evidence regarding the validity of the White Vulcan No. 1 claim, which Judge Sweitzer had previously found invalid, and evidence of a discovery on the claims before 1957.

On June 1, 1992, Multiple Use filed a further pleading. This pleading is best described as a motion to dismiss coupled with a further offer of proof. In this document Multiple Use tendered a withdrawal of its patent application, seeking dismissal of the hearing, based upon the tender of the withdrawal. ^{5/} The basis for the Multiple Use request for dismissal was this Board's statement in United States v. Multiple Use, Inc., *supra*, at 124 that "[t]here is no question that the record is sufficient to support dismissal of the contest if no patent application were pending." The offer of proof included exhibits intending to prove the existence of mining operations on the White Vulcan No. 1 claim, sales of materials from the claims during the period from March 1, 1988, through April 30, 1992, the deposition of pumice on the White Vulcan No. 1 and White Vulcan No. 2 claims, other uses for the pumice from the claims, and materials testing documents. Multiple Use offered these documents as proof that there was a discovery prior to July 23, 1955, and that the discovery continued to exist after that date.

^{5/} A copy of the withdrawal document was sent to the Arizona State Office, BLM, and received by that office on June 4, 1992. On Mar. 31, 1994, which was 45 days prior to Judge Child's May 18, 1994, Decision, the Arizona State Office issued a Decision accepting the withdrawal of Multiple Use's mineral patent application, cancelling the final certificate issued to Multiple Use on May 7, 1982, and noting that Judge Sweitzer had denied Multiple Use's Motion to Dismiss. Although it is obvious that the Arizona State Office was aware of the appeal, its Mar. 31 Decision was issued at a time in which it had no jurisdiction over the mineral patent application or the final certificate. The Mar. 31, 1994, Arizona State Office Decision is ultra vires, had no legal effect, and is a nullity. See George L. Cramer, 134 IBLA 186 (1995); Carol Carlton, 117 IBLA 13 (1990); Sierra Club, Oregon Chapter, 87 IBLA 7 (1985); Petrol Resources Corp., 65 IBLA 104, 108 (1982); AZL Resources, Inc., 64 IBLA 126 (1982).

On July 6, 1992, the Forest Service filed a statement in response to the Multiple Use Motion to Dismiss. Counsel for the Forest Service urged acceptance of the Multiple Use tender of a withdrawal of its patent application, but opposed the dismissal of the contest, arguing that the evidence it had presented and evidence it intended to present was sufficient to continue the validity contest. The Forest Service specifically asked Judge Sweitzer to find that the pumice was of a common variety.

By Order dated July 31, 1992, Judge Sweitzer asked for further briefing regarding whether it was permissible for Multiple Use to withdraw its patent application at that time, and, if permissible, whether the contest should be dismissed. On August 11, 1992, Judge Sweitzer issued a further Order. In this Order Judge Sweitzer vacated his July 31, 1992, Order and denied Multiple Use's Motion to Dismiss.

The basis for denying the motion to dismiss was stated as being the Board's having "left open the possibility that additional issues might be addressed on remand." (August 11, 1992, Order at 2.) After quoting the language in footnote 65 to United States v. Multiple Use, Inc., *supra*, Judge Sweitzer noted that the Forest Service had made an offer of proof that the Forest Service had deemed sufficient to permit an administrative law judge to conclude that, if established, the facts would compel reversal of his previous findings of fact, and rule "on remand that the pumice sold by the contestees for fabric conditioning is not a locatable mineral, but rather is a common variety material." Judge Sweitzer then noted that:

In further support of its argument that dismissal of the matter is inappropriate, contestant sets forth the principle that the Secretary of the Interior retains plenary authority to redetermine any issue relating to the validity of mining claims so long as title to the claimed land remains in the United States. United States v. Robert D. Fisher, 115 IBLA 277 (1990). In light of this principle and contestant's offer of proof, it is appropriate and in the interest of judicial economy to receive evidence regarding the issue of whether the pumice is a locatable mineral rather than to dismiss the matter so that contestant must file a new action if it wishes to exercise its authority to raise the issue of locatability. Therefore, contestee's motion to dismiss is denied.

(Order dated July 31, 1992, at 2-3.) Judge Sweitzer also ruled on Multiple Use's offer of proof as to the issues it had raised in its June 1, 1992, pleading, finding that Multiple Use had not made a sufficient offer of proof to warrant reopening the contest as to the additional issues Multiple Use had raised. Stated another way, he did not find their arguments compelling.

In April 1993, following a number of postponements, the case was reassigned to Administrative Law Judge Child, who set an August 23, 1993, hearing date. Following further postponements at request of counsel, they filed a Joint Motion to continue a hearing set for May 10, 1994, to permit a negotiated settlement. In an Order issued on April 18, 1994, Judge Child denied their motion.

A Hearing was held in Phoenix, Arizona on May 10, 11, and 12, 1994. Testimony was presented by three witnesses called by the Forest Service. The first was Kenneth Allen Jacobs, a Forest Service employee, who testified that mining had been ongoing on both claims since the prior hearing. He noted that, even though the Forest Service was of the opinion that the pumice was common variety it had been administering the claims as if the pumice were locatable. (Tr. 72.) The mining had been conducted by Arizona Tufflite under mining plans of operations. Mining was conducted in parcels 5, 11, 12, 13, 14, 15, 23, 24, 25, and 26, and a portion of parcels 32 and 6, under a mining plan of operations approved by the Forest Service on April 17, 1990. The plan of operations was amended in 1992 to include parcels 17, 18, and 23. (Tr. 79 and 86.) He estimated that stockpiles in the area contained 500,000 yards of processed material. Jacobs stated that he had personally observed the mining operations during the 4-year period immediately prior to the hearing.

The second Forest Service witness was Jerry M. Hoffer, Professor of Geology, University of Texas, El Paso. Professor Hoffer was considered an expert in the field of pumice deposits and pumice used in the fabric washing industry. (Tr. 138, 232.) During the course of his examination of pumice deposits and pumices used in the garment washing industry Hoffer developed a series of tests used by him to evaluate pumice for use in garment washing. He noted that three processes are used in the garment washing industry — acid washing, stone washing, and enzyme washing. (Tr. 141-42.) Hoffer had tested a number of deposits, including pumice taken from the White Vulcan claims and sold to the garment washing industry, and found White Vulcan pumice suitable for use in that industry. After noting that in 1987 there were 25 to 30 dealers selling pumice to the stone washing industry, that number had been reduced to 8 at the time of the hearing, when the industry changed and only the best could survive. (Tr. 198.) One of these was Arizona Tufflite, which had been selling pumice every year since 1984 or 1985. (Tr. 196, Ex. G-23.)

Hoffer testified that between 1986 and 1993 Arizona Tufflite sold pumice to the garment washing industry, receiving approximately 9¢ to 10¢ per pound. (Tr. 251.) He stated that the value of the Arizona Tufflite pumice sold to the garment washing industry was \$209 per metric ton, when calculated using the average shipping weight. (Tr. 258.) Using production and sales price figures found in the U.S. Bureau of Mines Yearbooks Hoffer found the average sales price for pumice (including pumice sold to the garment industry) during the period from 1987 through 1991 ranged from \$11 to \$24 per metric ton. He expressed an opinion that Arizona Tufflite pumice was competitive in the garment washing industry. (Tr. 272.) Hoffer stated that the price of pumice used in the building block industry, the largest consumer of pumice, was \$7.80 to \$13 per metric ton during the same period. (Tr. 290.)

Hoffer noted that he was retained by companies in the garment washing industry to find sources of pumice. (Tr. 106.) After noting that only 1 in 25 pumice deposits he examined contained pumice of a type suitable for garment washing (Tr. 279), he explained that he examined 173 domestic pumice deposits and found 14, including the White Vulcan deposit, containing pumice suitable for use in the stone washing industry. (Tr. 281, 287.)

Only 4 of the 14 deposits were in production and selling pumice to the industry at the time of the hearing. (Tr. 287.) During the period from 1987 through 1992 the Arizona Tufflite pumice was the best domestic pumice available in El Paso. (Tr. 294.)

The Forest Service's last witness was James M. Gubachy, a consultant in production, transportation and use of pumice, and technical sales representative in the chemical and garment-finishing business. (Tr. 183.) Gubachy stated that he had visited 30 operational or future sites for garment washing pumice in the U.S., Latin America, South America, and southeast Asia. (Tr. 387.) He stated that in 1989 Arizona Tufflite was selling to American Garment Finishers for 7 to 8 cents a pound in bulk, which was slightly less than bagged pumice. (Tr. 424.) He stated that the domestic pumice producers selling pumice to fabric washers in El Paso, Texas, during the period from 1988 through 1990 were Arizona Tufflite, Glass Mountain, and Orlancha California, and during the period from 1990 to the hearing date the producers were New Mexico Copra, General Pumice (which sold very little), and Arizona Tufflite. (Tr. 443.)

Following the presentation of the Forest Service case, counsel for Arizona Tufflite moved for summary judgment. (Tr. 442.) Following the presentation of arguments in support of and opposing summary judgment, Judge Child noted his opinion that "the Interior Board of Land Appeals, having remanded the matter, cannot but be satisfied with the evidence that's come in from the Government that there was at the time of the hearing, and continues to be, and has continued up to the present time to be, continued sales." (Tr. 458.) Quoting the next to the last paragraph of the majority opinion in United States v. Multiple Use, Inc., *supra*, Judge Child stated:

They say "we are unable to adequately discern the extent of the potential for continued sales of stone-washing pumice from the White Vulcan Number 2 claim at a price which would allow * * *" and so forth.

* * * * *

And I think the evidence of continued sales right up to the present has been made out by the Government in its case in chief at this hearing.

(Tr. 458-59.)

Judge Child quoted an Order issued by Judge Sweitzer on August 11, 1992, that "[t]he sole issue for hearing is whether the pumice on White Vulcan Number 2, previously found to possess unique properties which render it commercially more valuable than ordinary pumice, that is locatable, does, in fact possess such unique properties." He then stated:

And I think the evidence is clear that it does. It may be – I think it was stated that there are four, and I am talking

about the Government's evidence, that there are four suppliers of pumice in the United States. Two are recent suppliers, only since this past year, in New Mexico.

But, nevertheless, of the four in the opinion of the Government's witnesses, perhaps the least valuable, and the least desirable was the pumice from White Vulcan Number 2.

Nevertheless, although it was the least valuable, it is categorized as one of those useful for laundry purposes. And there's no evidence that these other sources have an inexhaustible supply.

There is no evidence that White Vulcan might not yet be the only available source, so this leaves us to speculate.

Not being permitted to do so, I must rule that Judge Sweitzer's test has been reached, Interior Board of Land Appeals has been reached, and has been covered by the Government, but it has failed to make a prima facie case.

I therefore dismiss this contest and rule, as Judge Sweitzer did, that the evidence is such that if a patent were pending, it could go forward, all other things being regular on parcels 26 and 32.

(Tr. 460-61.)

Judge Child had previously asked counsel for Multiple Use whether the claimant had selected two 10-acre tracts, as we directed in United States v. Multiple Use, Inc., supra, at 135. Counsel advised Judge Child that it had selected tracts 26 and 32. (Tr. 457.)

After making this ruling Judge Child asked if there were any other motions, and counsel for Multiple Use moved to have the hearing reopened to receive additional evidence regarding the validity of the White Vulcan No. 1 claim. After hearing arguments in favor of revisiting the issue of the validity of that claim, Judge Child found the arguments to be less than compelling and refused to exercise his discretionary authority do so. The motion was denied. (Tr. 466.)

On May 18, 1994, Judge Child issued a formal Decision dismissing the proceeding. After quoting the statement in United States v. Multiple Use, Inc., supra, at 125, setting out the reason for remand, and Judge Sweitzer's August 11, 1992, Order stating that "[w]hether the pumice on White Vulcan No. 2 previously found to possess unique properties which render it commercially more valuable than ordinary pumice (i.e., locatable) does, in fact, possess such unique properties" was the sole issue for hearing, Judge Child's Decision stated:

At the hearing the contestant called two witnesses who gave evidence to the effect that the pumice shipped from the White Vulcan No. 2 claim indeed had unique properties which

rendered it commercially more valuable than ordinary pumice for purposes of stone washing, with its principal market being El Paso, Texas. [Contestant's] witnesses further considered the fact that contestee's White Vulcan No. 2 claim is one of four current sources for stone washing pumices. Of the four, contestant's witnesses listed contestee's pumices as being the least desirable, but acknowledged that two of the four sources were of recent derivation, that is since 1990.

It is possible that changing conditions might in the future render contestee's pumice more or less valuable, but contestant's evidence clearly establishes that at the time of the earlier hearing and continuing to the time of the current hearing, said pumice had unique properties which made it valuable for stone washing and that it commanded a market position for that use.

In the afternoon of May 11, 1994, at the conclusion of contestant's case in chief, the contestee moved for dismissal of the contest on the ground that contestant had failed to make a prima face case as to the non-validity of the pumice discovery on White Vulcan No. 2.

Prior to ruling on the motion, contestee was required to elect which two of the nine 10-acre parcels it would select for purpose of making up its 20-acre selection on the White Vulcan No. 2 claim.

On the morning of May 12, 1994, contestee on the record made its election to take 10-acre parcels 26 and 32.

Thereupon, contestee's "Motion for Involuntary Nonsuit or Dismissal" of the contest was, and it is here again, GRANTED.

At that time, contestee presented a written "Motion for Further Hearing: Tender of Offer of Proof," which motion was then and is here again DENIED as untimely and without merit.

(May 18, 1994, Decision at 2.)

Arizona Tufflite appealed. In its statement of reasons (SOR) Arizona Tufflite seeks our review of "the administrative law judge's decision to refuse to accept evidence concerning the exposure, extraction and sale of special and distinct minerals and block pumice from White Vulcan I." (SOR at 2.)

In support of having this Board find that the administrative law judge should have accepted its offer of further evidence, Arizona Tufflite first points to the statement in footnote 65 of our Multiple Use decision that the administrative law judge could expand the scope of his review in the event that either party tenders an offer of proof sufficient to permit him to conclude that the facts tendered would compel a reversal of his previous findings of fact. It states that in response to the judge's directive that the parties should tender offers of proof for his consideration, the Forest

Service tendered an affidavit containing conclusions and opinions, rather than facts, and that at the hearing the Judge further opened the scope of the hearing to include testimony regarding the projected future of the stone washing industry. It argues that, at the same time Multiple Use submitted an offer of proof that the quality of the material mined from the White Vulcan No. 1 and White Vulcan No. 2 was the same and that the quality of the material would command a premium in the marketplace. It further argues that when it submitted a second offer of proof at the outset of the hearing Judge Child recognized that the Forest Service had allowed mining on the White Vulcan No. 1 claim, even though it was the conclusion of the Board that the White Vulcan No. 1 claim was invalid, and then stated that he had no authority to reopen the hearing as to the validity of the White Vulcan No. 1 claim.

[1] When the Board of Land Appeals remands a case to an administrative law judge, the administrative law judge has the implied authority to expand the scope of his review, unless specifically prohibited by the remanding decision, if either party tenders an offer of proof sufficient to permit him to conclude that, if established, the facts tendered would compel a reversal of his previous findings of fact. When a party tenders an offer of proof and the administrative law judge concludes that the offer of proof is not sufficient to compel expanding the scope of the hearing, this Board will not overturn that decision without a clear showing of error.

At this point we will note that there appears to be little question that during the period between our Multiple Use decision and the second hearing Arizona Tufflite undertook mining operations on both claims, and the Forest Service knew that Arizona Tufflite was mining from both claims and selling the product mined from both claims at a premium. To place the issue in its true context, we must not only remember what was remanded, but what was decided.

Each claim must be supported by a discovery, and, therefore, there must be an actual exposure of the valuable mineral within the claim. United States v. Dresselhaus, 81 IBLA 252 (1984); United States v. Feezor, 74 IBLA 56, 90 I.D. 262 (1983). Judge Sweitzer found that there was no exposure of locatable pumice on the White Vulcan No. 1 claim. The cited basis for this determination was the testimony of Wesley Morgan (brother of Clarence Morgan), when describing the properties making pumice suitable for a stone-washing abrasive. He stated that the pumice cannot have any clay lumps or staining in it (see Tr. 1352 (emphasis added)). Exhibit 74, a color photograph of pumice samples from the two claims, graphically illustrates the difference in coloration. The fact that the pumice on the White Vulcan No. 1 claim was not free from staining was also noted by Multiple Use's witness Sheridan, when he concluded that the coloration of the pumice from the White Vulcan No. 1 claim, as depicted in Exhibit 74, appeared to be hydrated iron oxide stain (Tr. 1632-33; see also Tr. 1650).

We note that the testimony Judge Sweitzer relied upon when concluding that there was no showing of iron stain free pumice on the White Vulcan No. 1 claim was presented by witnesses for both Multiple Use and the Forest Service. We agree with his interpretation of this testimony. We also agree that the preponderance of the evidence supports a finding that the air-fall pumice on the White Vulcan No. 2 claim has those above-described properties which give it a distinct and special value for use as an abrasive in the stone-washing industry.

United States v. Multiple Use, Inc., *supra*, at 109 (footnote omitted). As can be seen, both the original administrative law judge finding and our finding in that case were that there was no exposure of iron stain free pumice on the White Vulcan No. 1 claim at the time of the hearing. From the facts presented on remand, we are left with no doubt that the iron stain free pumice was exposed on the White Vulcan No. 1 claim subsequent to the hearing. Nothing presented by Arizona Tufflite would lead us to the conclusion that, as a matter of fact, there was an exposure of iron stain free pumice on that claim at the time of the hearing. Our conclusion on page 134 of the Multiple Use decision that "Judge Sweitzer's finding that no discovery of locatable mineral existed on the White Vulcan No. 1 claim at the time of the hearing is supported by the record, and we find no basis for overturning his decision" is not altered by the allegations of fact presented to Judge Sweitzer, to Judge Child, or on appeal. Said another way, neither Judge Sweitzer nor Judge Child found the tendered evidence to be sufficiently compelling to expand the scope of the hearing. Nor do we.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed as modified.

R.W. Mullen
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge