



# United States Department of the Interior

OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

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M-36984

Memorandum

To: Director, Bureau of Land Management

From: Solicitor

Subject: Excess Reserves Under the Mining Law

The Bureau of Land Management (BLM) California State Office has requested guidance on whether a quantity of mineral that is not presently marketable (commonly described as “excess reserves”) should be allowed to support a mineral patent pursuant to the Mining Law of 1872. This issue has arisen in the context of an application to patent a volume of common cinders in Inyo County, California that would supply the known market for 270 years. For the reasons that follow, I hold that whether excess reserves exist is a fundamental element in the marketability test and must be considered in a mineral report. Excess reserves, by definition, are not presently marketable and, therefore, cannot support a valid mining claim.

## BACKGROUND

### A. Excess Reserves and Marketability

The test for determining whether a “valuable mineral deposit” has been “discovered” within the meaning of the Mining Law, see 30 U.S.C. §§ 22, 23, and thus creates certain rights against the United States, may require an inquiry into whether a mining claimant is holding excess reserves. The Interior Board of Land Appeals (IBLA) has for many decades recognized that the presence of excess reserves affects the validity of a mining claim. United States v. Anderson, 74 I.D. 292, 303 (1967); United States v. Bunkowski 79 I.D. 43, 5 IBLA 102 (1972); United States v. McElwaine, 26 IBLA 20, 24 (1976).

The reason is straightforward: In order to satisfy the discovery test, a mineral deposit must be presently marketable. See United States v. Coleman, 390 U.S. 599, 602 (1968); Ideal Basic Ind., Inc. v. Morton, 542 F.2d 1364, 1369 (9th Cir. 1976) (“presently valuable mineral”); Barrows v. Hickel, 447 F.2d 80, 83 (9th Cir. 1971); Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959); United States v. Feezor, 130 IBLA 146,

189 (1994) (“presently marketable at a profit”); In re Pacific Coast Molybdenum, 75 IBLA 16, 28-30, 90 I.D. 352, 360 (1983) (“as a present fact”); solicitor’s Opinion M-36642, *Marketability Rule*, 69 I.D. 145, 146 (1962) (where available deposits far exceed the market, “proof of present marketability must be clearly shown”); cf. Layman v. Ellis, 54 I.D. 294, 296 (1933).

The size of a mineral deposit in relation to demand necessarily affects whether, or to what degree, that deposit is presently marketable. Specifically, where the total quantity of a mineral in a specific deposit exceeds all demand for that mineral in the market area for the foreseeable future; there is neither a present nor reasonably foreseeable future market for the particular mineral. To the extent excess reserves exist, in other words, a valuable mineral deposit does not exist. As the Ninth Circuit has put it:

If supply so calculated amounts to a superabundance and so overwhelms the existing demand as to reduce the value or profit increment to a level below that which would prove attractive to a prudent man, the material cannot be said to be marketable at a profit.

Melluzzo v. Morton, 534 F.2d 860, 864 (9th Cir. 1976). This principle has been called the “excess reserves” rule. The label “reserves” is inapt in this context to the extent it connotes or implies a mineral deposit that has a present value in the marketplace.<sup>1</sup> “Excess reserves,” by definition, have no present value in the marketplace and therefore cannot be said to be “valuable mineral deposits” within the meaning of 30 U.S.C. § 22. Nevertheless, the terminology has been used long enough that it could cause more confusion if we were to change it.

The Department has historically applied the “excess reserves” rule only with respect to

those types of minerals which occur in such abundance that only a small portion of the known deposits can be absorbed by the market at a profit. Minerals for which there is virtually unlimited demand, such as precious metals, and which can be extracted and sold at a profit, of course would not be the subject of such concern.

United States v. Oneida Perlite Corp., 88 I.D. 772, 786-87, 57 IBLA 167 (1981). Widely found industrial minerals that are subject to local or regional market forces

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<sup>1</sup> Cf. United States Department of Interior, A Dictionary of Mining, Mineral, and Related Terms 914 (1968) (defining reserves as possibly depending, in some circumstances, on application of “contemporary economic factors,” among other things).

Include limestone, pumice, gypsum, perlite, cinders, sand, and gravel. A claim or claim group for such commodities may contain far more material than can be marketed now or in the reasonably foreseeable future.<sup>2</sup>

The excess reserves rule is important in part because it tends to thwart the misuse of the Mining Law for non-mineral purposes. Were the excess reserves rule not followed, the Mining Law would in effect authorize the appropriation and even privatization (under the Mining law's patent provision) of federal lands when there is no reasonable prospect that the lands will be mined in the foreseeable future. As the Supreme Court has put it (in a unanimous opinion), "the federal mining law surely was not intended to be a general real estate law . . . ." Andrus v. Charlestone Stone Products Co., 436 U.S. 604, 611 (1978). Similarly, in United States v. Coleman, 390 U.S. 599, 602-03 (1968), the Court emphasized the importance of the marketability test as a way to ensure that claimants are not seeking land for purposes other than mining.

A federal judge once pointed out that, were there no such limitation, the "end result would be that 100,000 acres of public lands [on the outskirts of Las Vegas, Nevada, could be] patented as valuable for mining, where . . . not more than one percent of the material might have been marketable in the reasonably foreseeable future." Osborne v. Hammitt, 377 F. Supp. 977 (D. Nev. 1964). See also Melluzzo v. Morton, 534 F.2d 860 (9th Cir. 1976); Clear Gravel Enterprises v. Keil, 505 F.2d 180 (9th Cir. 1974), cert. denied 421 U.S. 930 (1975).

Excess reserves can exist on a single claim or all or part of a group of claims, considered collectively. On a single twenty-acre placer claim, for example, IBLA has held that ten acre increments of the claim which contain excess reserves cannot be said to embrace a valuable mineral deposit. See United States v. McCall, 7 IBLA 21, 79 I.D. 457 (1972), aff'd, McCall v. Andrus, 628 F.2d 1185 (9th Cir. 1980), cert. denied, 450 U.S. 996 (1981); cf. United States v. Clare Williamson & Lapine Pumice Co., 87 I.D. 34, 53 n.8, 45 IBLA 264 (1980). Or, where a mining claimant holds a group of several claims, which collectively contain reserves exceeding what is both presently marketable and necessary as a reasonable reserve supply, those claims constituting "excess reserves" would not constitute a valuable mineral deposit. See generally United States v. Oneida Perlite Corp., 88 I.D. 772, 57 IBLA 167 (1981).

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<sup>2</sup> The application of the Mining Law to such minerals has had a long and tortuous history. See Zimmerman v. Brunson, 39 L.D. 310 (1910); Layman v. Ellis, 52 L.D. 714 (1929); Act of July 23, 1955, 69 Stat. 368, 30 U.S.C. § 611 (1994).

## B. Reasonable Reserves

The present marketability requirement does not mean that a claim must contain a mineral deposit that can be marketed immediately. The Department has recognized that a mining claimant may hold “reasonable reserves” for future supply consistent with the present marketability requirement. United States v. Oneida Perlite Corn., 88 I.D. 772, 780-82, 57, IBLA 167 (1981); see also United States v. Gibbs, 13 IBLA 382, 396 (1973); United States v. Harenberg, 9 IBLA 77, 80 (1973); United States v. Bunkowski, 5 IBLA 102, 79 I.D. 43 (1972). In Oneida Perlite Corn., the IBLA explained:

What amount of reserves is “reasonable” is a determination to be decided on the basis of the evidence in each case. The nature of the mineral, its unit value, the extent of the market, and whether it is expanding or diminishing, the amount of similar mineral which can supply the market from other sources, might all bear on the question of whether the location of additional claims for the same mineral was justified as the act of a prudent man in the reasonable belief that by the expenditure of his labor and means a valuable mine might be developed on each such claim.

88 I.D. at 787 (citations omitted). Cf. United States v. Anderson, 74 I.D. 292, 303 (1967) (“[j]ustification exists only for holding valid those claims which would supply contestees with the deposits necessary to carry on an operation of the size they contemplate for a reasonable period of time, for in a hard economic sense only those deposits have a reasonable prospect of a market”)(emphasis added); United States v. Clare Williamson & Lapine Pumice Co., 87 I.D. 34, 52, 45 IBLA 264 (1980) (reasonably foreseeable market).

## BAKER AND ITS AFTERMATH

### A. Baker v. United States

In 1980, the United States Court of Appeals for the Ninth Circuit found “no basis to support” what it derided as IBLA’s “too much” rule. Baker v. United States, 613 F.2d 224 (9th Cir.), cert. denied, 449 U.S. 932 (1980). Baker submitted a patent application for four placer mining claims located on a volcanic cinder deposit prior to the Common Varieties Act of 1955. The primary market for this low-grade mineral was as fill material for landscaping and road construction. The IBLA held two of the four claims invalid in a contest brought by the Forest Service. On appeal, the Ninth Circuit said that IBLA had first found that Baker’s application satisfied the “marketability” test for discovery, but had then inexplicably gone on to conclude “that Baker had located claims

in excess of the reasonably anticipated market needs for cinders (the too much test).” 613 F.2d at 226. After treating IBLA's decision as establishing a new test, which it believed imposed an additional requirement for discovery under the Mining Law beyond marketability, the court rejected it.<sup>3</sup>

In fact, however, the IBLA had not erected a new requirement: It did agree that Baker had made a discovery, but on only some, not all, of his claims. United States v. Baker, 23 IBLA 319 (1976). A basic problem with his claims was that “some substantial portion of the available market was for purposes which are not cognizable under the mining law [i.e., its use as a road base].” 23 IBLA at 333.<sup>4</sup> The IBLA explained:

It follows that if sales of material of such non-cognizable uses cannot be considered in determining the marketability of the material in order to establish the value of the deposit, it would be equally improper to consider sales for such uses for the purpose of determining what volume of material a prudent locator might claim in the reasonable anticipation that the demands of the market would require that amount in the foreseeable future, reasonably projected.

Id.

Citing its previous decisions applying the excess reserves rule, the IBLA held:

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<sup>3</sup> The Baker court distinguished Hallenbeck v. Kleppe, 590 F.2d 852 (10th Cir. 1979), Clear Gravel Enterprises v. Keil, 505 F.2d 180 (9th Cir. 1974) cert. denied, 421 U.S. 930 (1975) and Osborne v. Hammit, 377 F. Supp. 977 (D. Nev. 1964), by explaining that each of those cases involved the application of the present marketability test. 613 F.2d at 227, 227 n.5, 228.

<sup>4</sup> Section 3 of the Act of July 23, 1955, 69 Stat. 368, 30 U.S.C. § 611, withdrew “common varieties”- of cinders from location under the general mining laws. Baker, therefore, had to show that a discovery of a “valuable” cinder deposit existed prior to July 23, 1955. And “material suitable only for fill purposes or for road base or for comparable uses has never been locatable under the mining laws, and, even if the material is suitable for other purposes, the sale of material for the uses just enumerated cannot be considered in determining its marketability.” United States v. Barrows, 76 I.D. 299, 306 (1969) aff'd sub nom. Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971). See also United States v. Verdugo & Miller, Inc., 37 IBLA 277, 279 (1978) (“material which is principally valuable for use as fill, sub--base, ballast, riprap . . . was never locatable.”).

The record . . . is devoid of any evidence which would even tend to justify Baker's location of multiple claims embracing 15 million tons of cinders. . . . Neither is there any evidence that there was, or is, any likelihood whatever that the market demand, reasonably projected for years into the future, will or could absorb such a quantity from these claims for purposes recognized under the mining law.

Id. at 334-35.

The Supreme Court denied the Department's request to review the Ninth Circuit's decision in Baker. Three Justices dissented. Writing for them, Justice Blackmun agreed that the court of appeals' ruling may have been premised upon a misunderstanding and, thus, might allow the privatization of lands without any presently marketable mineral deposit. In the process, he wrote, the court of appeals may have “unduly restrained the Secretary's authority to evaluate claims of mineral discoveries on public lands. . . .” 449 U.S. at 934.<sup>5</sup>

B. More Guidance from the Ninth Circuit: McCall v. Andrus

Just five months after Baker, the Ninth Circuit decided another excess reserves case. McCall v. Andrus, 628 F.2d 1185 (9th Cir. 1980), cert. denied, 450 U.S. 996 (1981) In the process, it distinguished and effectively limited Baker.

In McCall, claimants filed a patent application for a group of mining claims in the Las Vegas valley alleged to be valuable for sand and gravel. They received patents for part of five claims, but the BLM contested the remainder, alleging that portions were not “mineral in character,” applying the long-held rule that each 10-acre tract of a placer mining claim must contain a valuable mineral. See American Smelting & Refining Co., 39 L.D. 299, 301 (1010). As the IBLA noted in partially upholding BLM's challenge, “for land to be determined to be mineral in character the rule has always included demonstration of removing and marketing at a profit.” 79 I.D. at 465.

The hearing examiner held that certain 10-acre parcels in the claims were not mineral in character because the sand and gravel they contained would meet market demand for 100 years, so that on these facts, “it was not economically feasible to produce the material on

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<sup>5</sup> For a critique of Baker, see Donald W. Large, *Defining “Valuable” Mineral Deposits--A Continuing Legal Quagmire*, 1986 Ariz. St. L. J. 473-483. See also B. Lee, *Hardrock Mining and the Antitrust Laws: Too Much is Realty Too Much, Even in the Ninth Circuit*, 15 Golden Gate L. Rev. 49-64 (1985).

the contested tracts.” 628 F.2d at 1188 (quoting the hearing examiner).

The Ninth Circuit held that consideration of the relationship between the quantity of the Reserves and the existing market “is a proper application of the test for determining whether land is mineral in character.” Id. It discussed its pre-Baker decision in Melluzzo v. Morton, 534 F.2d 860, 864 (9th Cir. 1976), pointing out that “there is more to proof of marketability than proof that there was a local market,” and quoting Melluzzo's requirement that it “must appear that local demand was able to absorb additional material . . . and still permit an attractive profit to be realized.” The court held that its “recent decision in Baker . . . is not controlling here,” because in McCall the “character of the land claimed was contested,” whereas in Baker the IBLA had “refused to grant a patent for three entire claims even though it found that a valid discovery had been made on each claim.” 628 F.2d at 1189 (emphasis added).

While the Ninth Circuit has subsequently not reaffirmed the substantive holding in Baker, it has cited McCall with approval. Specifically, in Dredge Corp. v. Conn, 733 F.2d 704 (9th Cir. 1984), the court reaffirmed its pre-Baker holding in Melluzzo v. Morton, 534 F.2d 860 (9th Cir. 1976); cited to McCall four times;<sup>6</sup> and upheld the IBLA’s rejection of a mining claim for a mineral whose supply in the marketplace already exceeded the demand. The court concluded: “[E]ven though comparable claims are being mined, a new claim may be deemed unprofitable because the market has reached such a point of saturation that a new entrant can not make a profit.” 733 F.2d 704, 708 (9th Cir. 1984). Commentators experienced in Mining Law have observed that it is difficult to reconcile Dredge Corp. with Baker. Jerry L. Haggard & J. Stanton Curry, *Recent Developments in the Law of Discovery*, 30 Min. L. Inst. 8-1, 8-20 (1984).

### C. The IBLA’s Response

Soon after Baker and McCall, IBLA decided United States v. Oneida Perlite Corp., 88 I.D. 772, 57 IBLA 167 (1981). In that case, the IBLA thoroughly analyzed and reaffirmed its continued recognition of the role of excess reserves. It pointed out that in Baker the Ninth Circuit had misunderstood the excess reserves rule as a new requirement, and not, as IBLA put it:

merely a descriptive phrase used in certain circumstances to characterize deposits which are not “valuable” within the meaning of 30 U.S.C. § 22 (1976) because the claimant already possesses an ample supply of such mineral to satisfy his share of a limited market for years into the future, and the additional deposits so described

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<sup>6</sup> 733 F.2d at 706, 706 n.3, 707, 707 n.6.

are consequently of no economic value because they cannot be presently marketed at a profit.

88 I.D. at 796. The IBLA reaffirmed its long line of decisions holding that whether a particular deposit is “valuable” depends upon a consideration of the quantity of claimant's other holdings, market limitations, claimant's share of market, as well as the magnitude and sources of other supplies to the same market. 88 I.D. at 788. It pointed out that McCall and Baker illustrated opposite sides of the same coin. That is, whether the claimed land is characterized as non-mineral in character, as in McCall, or the mineral deposit on that land is characterized as “excess reserves,” as in Baker, “these expressions relate to whether or not there has been a qualifying discovery of a valuable deposit of mineral on that particular claim or portion thereof.” 88 I.D. at 795. Thus, in IBLA’s view, McCall in effect sharply limited Baker to the facts as the Ninth Circuit had mistakenly understood them.

#### D. The BLM’s Response

BLM’s initial response to this conundrum was to issue an instruction memorandum that simply said Baker must be followed and inquiries into “excess reserves” would no longer be made. IM 82-247 (July 1982). That memorandum addressed neither the Ninth Circuit’s decision in McCall nor the IBLA’s response in Oneida Perlite and was, therefore, rescinded five months after it was issued.. IM 83-124 (Nov. 24, 1982).

In the years since, the BLM and the IBLA have followed Oneida Perlite in practice, without detailed guidance. The BLM Mineral Examiners’ Handbook, for example, now provides for examining whether there are “unmarketable reserves” (excess reserves), citing to Oneida, McCall, Baker and Williamson. Mineral Examiners’ Handbook, Ch. 5, § 8, ¶ C (“Unmarketable Material”). IBLA has referred favorably to the excess reserves principle since its opinion in Oneida Perlite. See Yankee Gulch Joint Venture v. BLM, 113 IBLA 106, 115 n.6 (1990); United States v. Foresyth, 100 IBLA 185, 252 (1987); United States v. Swanson, 93 IBLA 1, 18 n.8 (1986). In 1984, BLM did consider proposing standards for applying the excess reserves principle, but never completed the job.

## CONCLUSION

For either of the following two reasons, the Baker decision does not preclude the BLM from continuing to examine whether the presence of “excess reserves” affects the validity of mining claims. First, by its own terms Baker’s reach is confined to situations where BLM has conceded that a claim is valid, but refuses to patent the claim on the ground that excess reserves are present. This does not describe the usual case. So long as BLM



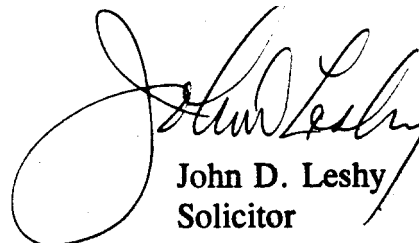
limits its inquiry into excess reserves to situations where it has not found a discovery, therefore, it can apply the excess reserves principle and still meet the requirements of Baker. An administrative record that clearly shows that the inquiry into the quantity of reserves is for the purpose of ascertaining whether the claimant has satisfied the present marketability requirement, either on a particular claim or 10 acre tract on a placer claim, will avoid the situation that troubled the court in Baker.

Second, the Baker decision has been sharply limited if not implicitly overruled by the Ninth Circuit's subsequent decision in McCall, as understood and applied by the Department for more than a decade. Following McCall, inquiries into excess reserves can continue to be made when examining whether the claimed land is "mineral in character."

Against, this background, BLM may consider developing guidance for mineral examinations where an analysis of present marketability could be affected by the presence of excess reserves. In doing so, BLM must recognize that "each case must be judged on its own facts," Solicitor's Opinion, M-36642, *supra* at 146, and that a number of variables could affect the determination of what quantity of material should be considered excess because, as the Ninth Circuit said in Melluzzo, it would "so overwhelm[] the existing demand . . . [that it] cannot be said to be marketable at a profit." 534 F.2d at 864. Among the factors to be considered are the particular mineral involved (each mineral having its own market demand, marketing and financing arrangements), changing market conditions, availability of substitute materials, and advancements in technology.

We are happy to work with you to craft uniform guidelines describing factors that a mineral examiner should consider when confronted with a mineral deposit of widespread occurrence. Such guidelines would expedite consideration of these cases and ensure consistency in the treatment of the marketability test among the BLM state offices.

This Opinion was prepared with the substantial assistance of Sam Kalen and Sharon Allender in the Solicitor's Office.



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