Editor's note: appeal filed Civ.No. (D.Or. July 24, 1990)

UNITED STATES
v.
MICHAEL R. WARE

IBLA 88-164 Decided January 25, 1990

Appeal from a decision of Administrative Law Judge Michael L. Morehouse declaring certain mining claims invalid. Contest Nos. OR MC 33349 through OR MC 33351 and OR MC 82699.

Affirmed as modified.

1. Evidence: Prima Facie Case--Mining Claims: Contests

When the Government contests a mining claim alleging lack of discovery of a valuable mineral deposit it has the burden of going forward with sufficient evidence to establish a prima facie case. When a Government min- eral examiner testifies that he has examined a mining claim and found the quantity and quality of the min- erals insufficient to support a finding of discovery,
a prima facie case is established.

2. Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Hearings

Absent a patent application, in a mining claim contest hearing there is no requirement that a mining claimant show that a contested claim is valid. Rather, the claimant's burden is to preponderate on the issues raised by the evidence.

APPEARANCES: Michael R. Ware, pro se, Jacksonville, Oregon; Eugene A. Briggs, Esq., Office of the Solicitor, Pacific Northwest Region, Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Michael R. Ware appeals from a November 17, 1987, decision of Admin- istrative Law Judge Michael L. Morehouse declaring the Little Brother

placer mining claim and the Britt, Rock-N-Roll, and Weesau lode mining claims void. 1/

BLM issued contest complaints for the subject claims on March 20, 1987, charging that quantities or qualities of minerals sufficient to constitute a valid discovery had not been found. Appellant filed an answer on behalf of himself, John Scott Baker, and Kevin Lee Ware, and, subsequently, filed an amended answer. Judge Morehouse held a hearing on this matter in Medford, Oregon, on September 24, 1987, and the appealed decision followed.

At the hearing Mark Hermeston, a BLM geologist, testified that he visited the four claims on October 24-28, 1985, along with BLM forester Ward Brookwell, and conducted a mineral examination on each claim (Tr. 6-7). Hermeston stated that on the Weesau claim he took the best mineral sample he could find and that on the other three claims he took samples at those discovery points indicated by claimants (Tr. 10, 109-14). The eight samples were sent to Sparks, Nevada, for assay analysis. The results indicate that the combined value of gold, silver, cobalt, copper, manganese, nickel, vanadium, and zinc contained in 1 ton of the most valuable sample is $3.94. The combined value of those minerals for the second most valuable sample is $2.97 per ton; and, the least valuable sample contains $1.43 worth of those eight minerals per ton (Exh. G-1). 2/

Hermeston conducted an economic analysis comparing two hypothetical mining operations and found mining costs of $79.05 and $50.53 per ton, plus costs of capital equipment, milling, and smelt expenses (Tr. 28, Exh. G-1). The Government's witness stated that he does not believe that a reasonably prudent person would expend time and means on these claims (Tr. 30). Hermeston was also called to testify by the claimants (Tr. 99-128).

Charles D. Humphrey, who testified for the contestees, stated that he took 20 credit hours in geology courses at Southern Oregon State College (SOSC) (Tr. 84), that he worked with the claimants (Tr. 75-78), that

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1/ The Britt, OR MC 33349, was located on Mar. 1, 1980, by appellant. The Rock-N-Roll, OR MC 33350, was located on Mar. 1, 1980, by John Scott Baker and appellant, and an amendment was filed with local authorities on Mar. 23, 1983, and with the Bureau of Land Management (BLM) on Apr. 12, 1983. The amendment lists only John Scott Baker as locator. The Little Brother, OR MC 33351, was located on Mar. 1, 1980, by John Scott Baker, Kevin Lee Ware, and appellant. The Weesau, OR MC 82699, was located on June 12, 1985, by appellant. All four claims are located in sec. 31, T. 37 S., R. 2 W., Willamette Meridian, Jackson County, Oregon. The lands were closed to mineral entry by a community pit designation dated Dec. 3, 1985 (Exh. G-1 at 5, G-4).

2/ In Exhibit G-1, BLM's mineral report, the Weesau claim is referred to as OR MC 38849, which was declared abandoned and void on Sept. 13, 1983. However, the Weesau was relocated on the same location on June 12, 1985, and the claim number OR MC 82699 was assigned (Exh. G-2, Tr. 8, 62-63, 106-08).

they found gold on the Little Brother claim by placer mining (Tr. 78-79), and that he has small vials containing gold from the Little Brother claim (Tr. 79).

Steve Lasell was also called to testify for the claimants. Lasell stated that he had visited the claims three times (Tr. 90), that he had seen extraction machinery on one of appellant's claims (Tr. 91), and that he had been shown ore with evidence of iron and with greenstone. Lasell said it was obvious to him there were extractable heavy metals present (Tr. 92). Lasell also testified that together he and appellant had processed some material from the Little Brother claim and that he had seen "a lot of heavy metal and evidence of gold and silver" (Tr. 94). Lasell opined that money could be made off of the claims (Tr. 95) and that appellant has a "brilliant idea" for processing ore (Tr. 97).

Claimant John Scott Baker testified that he had gone to SOSC for 4½ years, had studied "chemistry, physics and general science and educa- tion," and indicated that he is mostly familiar with the chemistry of metal extraction and acids (Tr. 130). Baker stated that the claimants had one vein sample from the Rock-N-Roll claim assayed and that the report indicated 3½ ounces per ton. He did not indicate what metal or metals were included in that assay value. He testified that a second assay from that claim produced unsubstantial results (Tr. 135), and described the process by which they had panned and crushed material on the claim until silver and gold were revealed. He stated that they had never sold gold from the Rock-N-Roll (Tr. 139).

Baker stated his belief that there are enough microscopic gold parti- cles on the Rock-N-Roll to produce "substantial amounts" (Tr. 144), and described the results of his experiments with acid leaching of materials from the claims (Tr. 146-53, 157-60). Baker expressed the opinions that the claimants could retrieve in excess of 10 or 20 ounces of gold from 1 ton of vein material (Tr. 154-56), and that, with respect to the Rock-N-Roll and Little Brother claims, a reasonable person would invest time and money with a reasonable expectation of developing a paying mine (Tr. 156-57).

Appellant also appeared as a witness on behalf of the claimants and stated that he had been prospecting for 10 years and that he was due to graduate shortly from college with a minor in geology (Tr. 171). Ware testified that on the Little Brother claim they encountered what he believes to be gold-bearing rock (Tr. 173), that one assay performed on material from the Rock-N-Roll claim showed 3½ ounces per ton (Tr. 177), and that he believes an assay would show 3½ ounces per ton almost anywhere on that claim (Tr. 179). Appellant described the machine he utilizes to process material from the claims, and entered photographs of the machine (Tr. 189-93, Exhs. R-9 through R-13). Appellant stated that he had processed 28 ounces of gold utilizing his machine, but that the gold was stolen (Tr. 194-95); and that he processed over 5 ounces of gold from a ton of rock which is very common in the area of these claims (Tr. 196).

Based on the evidence presented at the hearing, Judge Morehouse deter- mined that the Government presented a prima facie case that the claims are invalid. Further, he found that "there is simply no concrete evidence" to support the belief that there is sufficient gold and silver on the claims to satisfy the reasonable man test (Decision at 3), and he declared the claims null and void.

On appeal from that decision, Ware argues that the Government failed to present a prima facie case of claim invalidity at the hearing; therefore, appellant moves for dismissal. In support of his argument, appellant con- tends that, compared to the Government's expert witness, the claimants' witnesses possess superior expertise; that Judge Morehouse found the claim- ants hold a sincere belief their claims are valuable; and that the record actually supports the proposition that valid discoveries have been made.

The validity of a mining claim is dependent upon the disclosure of a valuable mineral deposit within the limits of the claim. 30 U.S.C. § 22 (1982). A valuable mineral deposit exists if the mineral found within the limits of the claim is of such quantity and quality that a prudent person would be justified in the further expenditure of labor and means with a reasonable prospect of success in developing a paying mine. United States v. Gillette, 104 IBLA 269 (1988). Evidence of mineralization may be sufficient to justify more exploration, but insufficient to justify development of a mine. In such a case, a valuable discovery has not been made. United States v. Gillette, supra at 275; United States v. Franklin, 99 IBLA 120, 125 (1987). To satisfy the prudent person test, a mining claimant must show that "as a present fact, considering historic price and cost factors and assuming that they will continue, there is a reasonable likelihood of success that a paying mine can be developed." In re Pacific Coast Molybdenum, 75 IBLA 16, 29, 90 I.D. 352, 360 (1983).

[1] When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it must establish a prima facie case of the claim's invalidity. United States v. New York Mines, Inc., 105 IBLA 171, 183, 95 I.D. 223, 230 (1988). Once the Government has met its burden, the claimant has the ultimate burden of refuting the Government's case by a preponderance of the evidence. United States v. Crawford, 109 IBLA 264, 268 (1989); United States v. Wolk, 100 IBLA 167, 170 (1987).

It is well established that a prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insuf- ficient to support a finding of discovery of a valuable mineral deposit. United States v. Gillette, supra at 274; United States v. Franklin, supra. At the hearing, a Government mineral examiner testified that he had examined the exposed workings on the claims and found the evidence of mineralization insufficient to support discoveries of valuable mineral deposits (Tr. 5-74). Thus, we find that the Government clearly did establish a prima facie case that appellant's claims are void for failure to locate a valuable mineral deposit.

It is therefore the burden of the claimants to refute the Government's case by a preponderance of the evidence. For the reasons set forth below, we conclude the claimants have not met this burden.

At the hearing, claimants testified that an assay showing valuable material at the rate of 3-1/2 ounces to the ton was performed on a sample of vein material from the Rock-N-Roll claim. 3/ Appellant stated that the assay was not reputable or conclusive (Tr. 175-78), and indicated that the tuff sample he took to be assayed weighed between 65 and 70 pounds (Tr. 178). A certified assay report was not produced. However, a photocopy of a letter describing assay results was attached to the contestees' posthearing brief. The one-page letter, addressed to Matt Stormberg and signed by Ron Young, indicates that an assay was performed on a 1 troy ounce soil sample and that gold at the rate of 5.3 troy ounces per ton was found. A handwritten note, signed by Matt Stormberg, appears on the bottom of the photocopied letter and indicates that the assay was performed for appellant and Baker on a soil sample received September 1, 1983, from the Rock-N-Roll claim. There is no indication that the assayer was registered.

Claimants' assay evidence is clearly inadequate to refute the Govern-ment's assay results. Assays of vein samples do not reflect the probable value that could be achieved in actual mining operations, United States v. Denison, 76 I.D. 233, 246 (1969), aff'd sub nom., Smith v. Morton, 489 F.2d 1275 (9th Cir. 1974), cert. denied, 419 U.S. 835 (1974), and the sample which revealed mineralization was taken from the vein only. Moreover, an isolated showing of a high mineral value is insufficient as there must be evidence of continuous mineralization. United States v. Gillette, supra at 275.

In addition, claimants' assay results are clearly less reliable than those submitted by the Government. There is no evidence that the claimants' assay was conducted by a registered assayer or that the result is certified. Moreover, claimants' testimony concerning the size of the sample and the assay result vary greatly from the information contained in the letter to Matt Stormberg from Ron Young.

Claimants also presented testimony concerning gold allegedly produced from their claims. However, Judge Morehouse did not find this testimony
to be credible (Decision at 3-4) and we find no reason to disagree with his conclusion.

Appellant maintains the Judge applied the wrong standard in deciding the matter. Appellant refers to two statements in the decision to support this argument: "The ultimate burden is on the mining claimant to overcome the Government's case by a preponderance of the evidence" (Decision at 2),

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3/ We note that testimony regarding another assay was presented as well. However, as claimant Baker labelled this assay "unsubstantial" (Tr. 135) and no additional evidence or testimony concerning it was presented, this assay is not at issue herein.

and, the burden is "upon contestees to show by a preponderance of the evi- dence that the claims are valid" (Decision at 3).

[2] Absent a patent application, a mining claim contestee need not show that a claim is valid; thus, the second quotation cited by appellant is an erroneous statement of the law. However, Judge Morehouse correctly announced the specific legal standard applicable in the first statement appellant quotes. Moreover, Judge Morehouse properly applied the appropriate standard, and we are in agreement with his findings and conclusions. Thus, despite the misstatement of law referred to by appellant, it is appropriate to affirm the Judge's decision as modified by the deletion of that misstatement. See United States v. Crawford, supra; United States v. Cannon, 70 IBLA 328, 329 (1983).

Appellant argues that pursuant to 30 U.S.C. § 40 (1982), claimants were entitled to notice 10 days in advance of the mineral examination and that because they received notice less than 5 days in advance, 4/ the results of the Government assay may not be used against the claimants. The provision referred to by appellant reads:

> All affidavits required to be made under sections 21, 22 to 24, 26 to 28, 29, 30, 33 to 48, 50 to 52, 71 to 76 of this title, and section 661 of Title 43 may be verified before any officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register of the land office. In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided on personal notice of at least ten days to the opposing party * * *.

30 U.S.C. § 40 (1982). Appellant states that the BLM Manual requires notification and an invitation to accompany the examiner during the field investigation, and submits that the purpose of this requirement is to
allow claimants to suggest sampling points (Statement of Reasons at 2). Ware argues that the claimants were prevented from suggesting their favorite point for sampling, as it was covered by a cave-in and notification was inadequate to allow them to dig it out.

The language of 30 U.S.C. § 40 (1982), which appellant would have us apply to mineral examinations, clearly applies to testimony and proofs in the form of affidavits made before officers authorized to administer oaths. Appellant has failed to show that 30 U.S.C. § 40 (1982) applies to mineral examinations as well. Moreover, it is clear that appellants were notified of the mineral examination, were present during the examination, and were allowed to make recommendations as to where the sample should be taken

4/ The copy of the notification of mineral examination contained in the file is dated Oct. 16, 1985. There is no reference in the file as to the exact date the claimants received notification.

(Exh. G-1 at 7). When mining claimants fail to keep discovery points open and available for inspection, they assume the risk that a mineral examiner will not be able to verify an alleged discovery. United States v. Franklin, supra at 125.

Thus, we find no basis for appellant's suggestion that the Government is not allowed to use the results of its mineral examination against the claimants and his motion to dismiss due to inadequate notice is denied.

Appellant also argues that access to the claims was hindered by BLM and various testimony on the access issue was presented at the hearing. It is clear that BLM may not deny mining claimants access to their claims across public lands. 43 U.S.C. § 1732(b) (1976), Mosch Mining Co., 75 IBLA 153 (1983). However, it is also clear that the BLM actions which appellant alleges hindered claimants' access do not concern BLM property. 5/ Appel- lant has failed to establish that BLM conducted any unauthorized activities or that inability to access their claims is the reason the claimants were unable to overcome BLM's prima facie case of invalidity.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Judge Morehouse is hereby affirmed as modified herein.

John H. Kelly
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge

5/ It is clear that SOSC owns at least part of the land over which claim- ants must pass to access their claims from the north. A decision to deny the claimants access over SOSC land was made by SOSC. The amount of BLM input into the SOSC decision is disputed by BLM, appellant, and SOSC in various documents filed with the Board between Apr. 18 and June 10, 1988.

Claimants Baker and Ware also testified concerning a county court order which allegedly denied claimants access to their claims (Tr. 162-63, 207-09). Ware stated that at the county court hearing concerning access a BLM representative testified against the claimants. It is not clear from the record whether the land involved in the county court order is owned by SOSC or another.